

# **“Ain’t No Snitches Ridin’ Wit’ Us”: How Deception in the Fourth Amendment Triggered the Stop Snitching Movement**

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## INTRODUCTION

They call it “the tipping point.”<sup>1</sup> It is the idea that small events can have drastic effects, and that in one moment—the tipping point—a trend can begin to spread like a viral epidemic.<sup>2</sup> What you need to create a tipping point is a “simple way to package information that, under the right circumstances, [makes] it irresistible. All you have to do is find it.”<sup>3</sup> The Stop Snitching movement has found its tipping point—and is now infectiously sweeping through the public.

What began as a few choice lyrics by rappers in the late 1990s, the Stop Snitching movement has now sparked into a cultural campaign spawning rap music and clothing apparel<sup>4</sup> thanks to a DVD called “Stop Fucking Snitching.”<sup>5</sup> The more daunting aspect of the movement is that it has gathered a whole generation of teens and young adults who are refusing to

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<sup>1</sup> MALCOLM GLADWELL, *THE TIPPING POINT* 9 (First Back Bay) (2000).

<sup>2</sup> *Id.* at 7. The author uses his tipping point theory to describe how trends, such as the popularity of footwear and the drop in New York City’s crime rate, begin and spread like epidemics. *Id.*

<sup>3</sup> *Id.* at 132.

<sup>4</sup> Stop Snitching, <http://stopsnitching.com/flash/index.htm> (last visited Jan. 10, 2007) [Hereinafter StopSnitching.com]. At the last time this site was visited, this website had a direct link from which t-shirts, DVDs, and CDs were sold, as well as a constant stream of Stop Snitching-focused music playing in the background. The website has since been discontinued.

<sup>5</sup> Jeremy Kahn, *The Story of a Snitch*, ATLANTIC MONTHLY, Apr. 2007, at 86. Since 2004, a sequel of the DVD was released in 2007 called (appropriately enough), “Stop Snitching 2.” Alex Johnson, ‘Start Snitching,’ *Crime-Hit Communities Urge*, MSNBC Jan. 22, 2008, <http://www.msnbc.msn.com/id/22734240/>. In this sequel there is the same mix of threats toward snitches and violent retribution: multiple people are filmed talking about their desire to kill snitches. *Id.*

talk to the police—even when they are innocent witnesses to violent crime.<sup>6</sup> They are joining the thousands of other citizens who, led by popular rap artists, are avoiding law enforcement despite the fact that violent crimes are continually ripping through their neighborhoods.<sup>7</sup> Baltimore's homicide rate rose so quickly that in 2007, the city was expected to "top 300 murders for the first time in seven years."<sup>8</sup> The murder rate in Philadelphia is alarmingly high, with the city once coping with a murder a day or more—five occurred on one particular Sunday alone.<sup>9</sup>

Whether this movement is characterized as a subset of witness intimidation or just as a passing fad, the effect of Stop Snitching is real, the potential hindrance it poses to America's trial system is devastating, and its momentum is steadily growing. Whereas previous issues of "snitching" referred mostly to the "jail house rat" or a co-conspirator,<sup>10</sup> the Stop Snitching movement has spilled over the penitentiary walls and into the streets of Baltimore,<sup>11</sup> Philadelphia,<sup>12</sup> Dallas,<sup>13</sup> and other major American cities.<sup>14</sup> This code is being adhered to not only by prisoners, but by thirteen-

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<sup>6</sup> CBS 60 Minutes: *Stop Snitching* (CBS television broadcast Aug. 12, 2007) [hereinafter *60 Minutes*].

<sup>7</sup> Kia Gregory, *Call the Police*, PHILA. WKLY., July 25, 2007.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 46 (2003) ("[T]he prototypical example of the cooperators with no connection to his target is the jailhouse snitch who testifies about a cellmate's 'confession.'"). See also *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) ("No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence."). In a vivid portrayal, *The New York Times* provided this description of a confidential informant's 'job duties': "They act as eyes and ears. They serve as secret tipsters. They take the police, by proxy, to the dangerous and privileged places where badges cannot go." Alan Feuer & Al Baker, *Officers' Arrests Put Spotlight on Police Use of Informants*, N.Y. TIMES, Jan 27, 2008, at N25. For being known as a "detective's best friend," it is not hard to see why *paid* informants are despised and loathed on the streets. *Id.*

<sup>11</sup> Julie Scharper & Alia Malik, *Shooting Victim Was Murder Witness: Rosedale Man Died Days Before City Trial*, BALT. SUN, July 4, 2007, at A1.

<sup>12</sup> Rick Hampson, *Anti-Snitch Campaign Riles Police, Prosecutors*, USA TODAY, Mar. 29, 2006, at 1A.

<sup>13</sup> Linda Leavell, *Dallas DA Fights 'Anti-Snitching Mentality'*, DALLAS MORNING NEWS, Aug. 15, 2007.

<sup>14</sup> See Ronald Moten, *The Real Meaning of 'Snitching'*, WASH. POST, Aug. 19, 2007, at B2 (citing the prevalence of the non-snitching code in Washington D.C., Newark, and Boston).

year-old girls in school, middle-aged neighbors across the street, and ordinary citizens who would rather run *away* from the police instead of *to* them. Because Stop Snitching is mostly a pop culture movement propagated by rap lyrics, t-shirts, and word of mouth, the difficulty in how to quell it remains evident. The options to *legally* stop a movement based on an *unspoken* code are limited. Even worse for legislators, Stop Snitching mostly advocates *non-action*, in the form of not talking to the police. Current state obstruction of justice laws only punish those who *actively* inhibit witness testimony.<sup>15</sup> Supporters of the Stop Snitching movement shield themselves with the First Amendment<sup>16</sup> and stand seemingly invincible—offering only a distrustful glare toward police and prosecutors. Yet that invincibility can be broken, as long as the true causes of the movement are addressed and countered.

The Stop Snitching movement is a much more perplexing epidemic than it may seem. Spread mostly through inner cities and African American pop culture, the movement is intricately tied to race. Nevertheless, the problem of “Stop Snitching” should not, and cannot, be surmised as just a peculiar stubbornness and apathy toward the law. The pressures to adhere to a social code are strong,<sup>17</sup> and the reasons to follow *this* particular code of Stop Snitching stem from a deeply rooted distrust toward the police. For decades, there has been an obvious and problematic tension between police and African Americans.<sup>18</sup> Much of the police conduct that is now considered

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<sup>15</sup> See *infra* Part II-B for the full survey of state protection laws and for an analysis of how they fall short of countering the Stop Snitching movement.

<sup>16</sup> See Hampson, *supra* note 12. For a complete discussion of First Amendment protections of Stop Snitching, see *infra* Part II-A.

<sup>17</sup> See generally Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire For Interpersonal Attachment as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497 (1995). For a succinct and illuminating discussion on the social psychology of human motivations, see TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 25–27 (Russell Sage Foundation 2002) [hereinafter TRUST IN THE LAW]. The authors note the difference between intrinsic and extrinsic factors of motivation, the former being entirely voluntary and personally grounded. *Id.* at 26–27. Such intrinsic motivations to follow the Stop Snitching code—such as the distrust in police—are what leaders need to address in order to quell the Stop Snitching epidemic. See *infra* Part III-A.

<sup>18</sup> One prolific example is the phenomenon called “driving while black.” David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 266 (1999). This occurs when “police [use] traffic offenses as an excuse to stop and conduct roadside investigations of black drivers and their cars, usually to look for drugs.” *Id.* In a study completed by psychologist Dr. John Lamberth at Temple University, experimenters carefully gathered data from over 43,000 cars on the New Jersey Turnpike—making sure to note each driver’s race and whether or not they were speeding. See John Lamberth, *Driving While Black; A Statistician Proves that Prejudice*

standard practice has been determined by Fourth Amendment search and seizure law, as set forth by the United States Supreme Court.<sup>19</sup> This amendment protects against unreasonable searches or seizures; however, through a line of cases dealing with the search and seizure of people in cars or in the streets, the Court has created a body of case law that permits the police (either expressly or implicitly) to use deception.<sup>20</sup> Inadvertently, the Supreme Court created loopholes within the protections of the Fourth Amendment, which are often disproportionately used by police against minorities. This distrust that African Americans quietly carry toward the police simmered for decades until it reached its tipping point: a simple DVD.

This Note argues that the Stop Snitching movement is the manifestation of distrust created by continual use of police deception during search and seizure encounters. Part II.A reviews the beginnings of the Stop Snitching movement, its sudden burst into mainstream pop culture, and its pervasive characteristics—including why people feel the need to adhere to a socially based code. Its corollary parts will discuss the movement's actual and potential effects, as well as what cities are doing to try to counter the movement. Part III begins by explaining why the Stop Snitching movement is heavily protected by the First Amendment and then surveys the current obstruction of justice laws in effect. Part III concludes by explaining why these obstruction of justice state statutes are ill-equipped to counter the Stop Snitching movement. Part IV first delves into why instilling trust in the law is the necessary starting point for combating this movement. The latter part then demonstrates how two areas of Fourth Amendment jurisprudence, pretextual stops and Fourth Amendment seizures of people, have given the police the constitutional means to blatantly use deception in their everyday interactions with the public. It is due to this deception that anger builds against law enforcement, fueling the Stop Snitching movement. Part V argues that in order to counteract this distrust, the Supreme Court must

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*Still Rules the Road*, WASH. POST, Aug. 16, 1998, at C1. Dr. Lamberth found that although African Americans made up only 15% of the turnpike's speeders, they actually made up 35% of the cars that were pulled over—translating into a probability that they will be 4.85 times as likely to be stopped. *Id.* Even more astonishingly, African Americans were 16.5 times as likely to be arrested than their white counterparts. *Id.* For an example of how a state court applied this information, see *State v. Soto*, 734 A.2d 350, 352 (N.J. Super. 1996) (statistical evidence, in part presented by Dr. Lamberth, proved the existence of a de facto policy of disproportionately targeting African American drivers for investigation and arrest).

<sup>19</sup> The complete language of the Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

<sup>20</sup> See *infra* Part III.

tighten search and seizure laws such that the condoned deception under Fourth Amendment law is far less brash.

## I. THE CODE ON THE STREET: STOP SNITCHING

From its inception, the Stop Snitching movement has done nothing but gain momentum—and for good reason. The message easily spreads through popular music and fashionable t-shirts to people who feel a strong social need to adhere to this code. The effects of the movement are both palpable and alarming, forcing district attorneys around the country to brainstorm some sort of counter-movement with the hope that something can be done to stop this code of silence from sweeping through the nation's cities.

### A. *Don't Break the Code*

In late 2004, Rodney Bethea had an idea: he decided to make a low-key freestyle documentary.<sup>21</sup> But as Bethea began to tape individuals talking to the camera on the street, something unexpected happened—they all began to berate informants and graphically describe what should be done to them.<sup>22</sup> As this underground DVD circulated through Baltimore, it stirred up a phrase that had been around since 1999: Stop Snitching.<sup>23</sup>

This humble DVD was the pivotal tipping point that started an epidemic. Contrary to Bethea's intentions, the Stop Snitching message has evolved to advocate not talking to the police—whether one is caught committing a crime or whether one is a mere witness to one.<sup>24</sup> Followers of the code employ it in relation to any crime, including extremely violent ones such as rape and murder.<sup>25</sup> The immediate catchiness of the slogan is augmented by a

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<sup>21</sup> Kahn, *supra* note 5, at 88. Carmelo Anthony, an NBA star, later explained to the *Baltimore Sun* how he incidentally became featured on the DVD: "I was back on my block, chillin'. I was going back to show love to everybody, thinking it was just going to be on the little local DVD, that it was just one of my homeboys recording." *Id.* at 86.

<sup>22</sup> *Id.* at 88. In one scene, a Baltimore rapper, Skinny Suge, told the camera: "To all you snitches and rats . . . I hope you catch AIDS in your mouth, and your lips the first thing to die, [expletive]." *Id.* at 86 (alteration in original).

<sup>23</sup> The phrase "Stop Snitching" is believed to have been started, or at least popularized, by a rapper called Tangg da Juice from Boston. *Id.*

<sup>24</sup> *Id.* at 82 (explaining that the "gangland code of silence, or *omerta*" has spread from "organized crime to the population at large").

<sup>25</sup> When the *60 Minutes* broadcast originally aired in April, the rapper, Cam'ron, stated that he would not call the police if he knew a serial killer was living next to him. Instead, he said, "I'd probably move." However, after being widely criticized for this, Cam'ron later apologized for some of his comments. *60 Minutes*, *supra* note 6.

vast assortment of apparel boldly sporting the slogan.<sup>26</sup> A commonly sold t-shirt is simple in its design, yet starkly unambiguous as to its message: the t-shirt has a black background with a stop sign, large across the chest, displaying “Stop Snitching” in bold font.<sup>27</sup> Yet supporters are not limited to just wearing t-shirts. The Stop Snitching logo has graced the front of baseball hats, appeared in graffiti<sup>28</sup> and has even been stenciled onto real street signs.<sup>29</sup>

The Stop Snitching message is probably best carried through the medium of rap music. Dozens of mainstream rappers have contributed to the Stop Snitching discography.<sup>30</sup> The lyrics to this genre of rap, known as gansta, are explicit and violent toward snitches, and they usually describe what kind of retribution their writers believe snitches deserve: “Don’t let your mouth open up ‘cause you don’t wanna see the handgun open up . . . Ain’t no snitches ridin’ wit’ us . . .”<sup>31</sup> Yet despite the aggressive and brutal lyrics, the music itself remains somewhat subdued, surprisingly restrained, and undeniably alluring. These rap stars are gathering young fans precisely because their music is attractive to listen to. Through the lure of magnetic music, rap artists are becoming teen idols and models of behavior. Either intentionally or not, younger generations are taking these Stop Snitching lyrics to heart.<sup>32</sup>

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<sup>26</sup> Tanika White, ‘*Stop Snitchin’ Shirts Have People Talking for Different Reasons in City*’, BALTIMORE SUN, Apr. 30, 2005.

<sup>27</sup> StopSnitching.com, *supra* note 4. Other popular shirts include an un-smiley face with the phrase “I’ll Never Tell” across the front.

<sup>28</sup> Ben Finley, *Questions Surround ‘Snitch and Die’: A Threat or Kids Just Messing Around?*, INTELLIGENCER, Aug. 13, 2007, at B5. The actual written phrase on the pavement was “Snitch and Die.” *Id.*

<sup>29</sup> An individual had even stenciled the word “Snitching” under the word “Stop” on a stop sign. *Id.*

<sup>30</sup> E.g., OBIE TRICE FEATURING AKON, *Snitch*, on SECOND ROUND’S ON ME (Shady Records 2006). Shady Records, the label that produced Obie Trice, was established by the incredibly popular artist Eminem. Shady Records, [www.shadyrecords.com](http://www.shadyrecords.com) (last visited Jan. 11, 2008). See also Elizabeth Goodman, *Jay-Z Returns to His Roots for ‘American Gangster’-Inspired New Album*, ROLLING STONE, Sept. 20, 2007 (noting that Jay-Z’s new song, “No Hook,” enforces the “Stop Snitching” ideology).

<sup>31</sup> LIL WAYNE, *Snitch*, on THA CARTER (Cash Money Records 2004). The most explicit parts of Chamillionaire’s lyrics have not been included, yet the anti-snitching message still rings clear: “Russian Roulette, yep [omitted] bet the barrel will spin, you hear that, yea [omitted] that’s the sound of revenge . . . Listen to da G-code, if you know that I know, then you’ll keep yo’ mouth closed . . . we don’t tolerate snitches.” CHAMILLIONAIRE, *No Snitchin’*, on THE SOUND OF REVENGE (Umvd Labels 2005). For mainstream lyrics written by Master P and Snoop Dogg, too explicit to reprint here, see MASTER P, *Snitches*, on MP DA LAST DON (Priority Records 1998).

<sup>32</sup> 60 Minutes, *supra* note 6. The popular rapper, Cam’ron, is idolized by teenagers in inner cities—when he started to wear pink, so did his fans. *Id.* When asked about this,

This Note contends that the need to adhere to this code is not due to a personal flaw carried by inner-city citizens; nor can it be reduced to a characteristic of just the African American community.<sup>33</sup> Moreover, this Note does not argue that Stop Snitching is a mentality held by all members of the hip-hop community.<sup>34</sup> Quite the contrary, the need to belong has been characterized as a “fundamental human motivation” applicable across race, socioeconomic status, and gender.<sup>35</sup> This social bond can be formed through joyous or arduous shared experiences, and it is so strong, that “people resist losing attachments and breaking social bonds, even if there is no material or pragmatic reason to maintain the bond and even if maintaining it would be difficult.”<sup>36</sup> Furthermore, people can develop physiological effects, such as illness and depression, when they are devoid of meaningful social relationships and acceptance.<sup>37</sup>

When a code such as the one promoted by the Stop Snitching movement is so pervasive within a culture, it is extremely difficult to exhibit behavior contrary to it. Rappers who do not follow the anti-snitching code risk losing their street credibility and jeopardizing their music sales.<sup>38</sup> At the same time, ordinary people who break the code face social ostracism, retribution, and (according to the rap lyrics) physical violence. As one teenager explained, “[I]f [people] know you talk to the police, they don’t be around you. And if people talk on them and they get locked up, their friends come up on you and

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one teenager said, “Whatever they dish out, we eat it up. They could dish out the nastiest thing in the world, but we still will eat it up.” *Id.*

<sup>33</sup> Police themselves have a code of silence. Kahn, *supra* note 5, at 88. This was pointed out by Bethea (the creator of the Baltimore DVD): “[O]fficers who break [the code] by reporting police misconduct are stigmatized in much the same way as those who break the code of silence on the street.” *Id.* A version of the anti-snitch idea has also been propagated by Hollywood. See, e.g., *SCENT OF A WOMAN* (Universal Studios 1992). The protagonist in this movie was set to be expelled for not telling school officials who vandalized the headmaster’s car; yet at the climatic end of the movie, was praised and exonerated for his self-discipline in not snitching. *Id.* The individual who *did* cooperate (i.e. snitch) received neither recognition nor commendation for his cooperation. *Id.*

<sup>34</sup> *City Police Ask Swizz Beatz to Renounce Anti-Snitching Lyrics*, USA TODAY, July 25, 2007. Swizz Beatz was praised for his promise not to rap about hard-core violence. *Id.* He also stated that he did not support the ‘Stop Snitching’ campaign and that his record was altered for radio-edit. *Id.* Indeed, one factor in people’s reluctance to speak with police is fear of retaliation—which is quite universal beyond just race.

<sup>35</sup> Baumeister & Leary, *supra* note 17, at 521 and accompanying notes.

<sup>36</sup> Baumeister & Leary, *supra* note 17, at 520.

<sup>37</sup> *Id.*

<sup>38</sup> *60 Minutes*, *supra* note 6. When the famous and multi-platinum-selling artist, Busta Rhymes, refused to talk to the police about a shooting that he might have witnessed, many assumed that it was because he didn’t want to hurt sales of his CDs. *Id.* Being labeled a snitch would have demolished his street credibility. *Id.*

hurt you or something.”<sup>39</sup> This fear of violence is not unfounded. In a chilling example, an Arizona woman had the word “snitch” scarred onto her face with a branding iron after she reported suspected child abuse.<sup>40</sup> Still others are enforcing the Stop Snitching message by permanently silencing those who talk to the police: a sixteen year old teenager was gunned down and shot three times for giving information to authorities.<sup>41</sup>

As if the threat of real physical violence was not enough, it is entirely possible that citizens also feel guilt for betraying their neighbors. Obie Trice’s lyrics from the record, *Snitch*, touch upon the disloyalty involved in breaking the code:

Once he got pinched, coincided with law  
Same homie say he lay it down for the boy  
Brought game squad around ours  
How could it be? Been homies since Superman draws  
Only phoniness never came to par  
He had us, a true neighborhood actor  
Had his back with K’s  
Now we see through him like X-Ray’s.<sup>42</sup>

These lyrics describe how a childhood friend has collaborated with police. The social bond that might have been shared in the past is now considered “phony.” The trust is gone, and the relationship is broken, which can be devastating to an individual whose social ties help him survive amidst inner city warfare. Thus, the psychological need to adhere to a social code of conduct remains incredibly strong—as the number of people who adhere to the Stop Snitching code only grows.

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<sup>39</sup> Kahn, *supra* note 5, at 84; *see also* Erin Grace, *To Fight Gunplay, Mum’s the Not the Word*, OMAHA WORLD-HERALD, Sept. 2, 2007. Teenagers are not only aware of what the Stop Snitching code advocates, but they are painfully cognizant of the ramifications of not following it. One fourteen-year-old girl said, “I’m not snitching on nobody, I swear to God! I’m not about to say who, I’m not about the say where, either . . . it ain’t my business.” Grace, *supra*. Another thirteen-year-old explained, “You can get killed out here if you snitch.” *Id.*

<sup>40</sup> Johnson, *supra* note 5. Even children are not spared from retribution after talking to the police. During one trial in Rochester, New York a thirteen-year-old witness showed up to trial with a fat lip and other injuries after being beaten for cooperating with the police. *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> OBIE TRICE FEATURING AKON, *supra* note 30.



*B. Stop Snitching Spreads and the Public Listens*

In the summer of 2007, news articles across the country abounded with stories of law enforcement bemoaning the lack of forthcoming witnesses to various crimes. In Denver, police believe that twenty people witnessed the fatal shooting of Thomas Powell, yet they were still experiencing difficulty with having people coming forward to cooperate.<sup>43</sup> In Dallas, police are sure that about thirty to forty individuals witnessed the murder of Brandon Ratcliff, yet only about a dozen have responded to law enforcement.<sup>44</sup> In Newark, police officers were left with only the account from the lone shooting survivor of an execution style murder that took the lives of three college-bound students.<sup>45</sup> Nashville police remain stumped as they fail to identify any credible witnesses to a murder that happened in broad daylight.<sup>46</sup> Even when individuals are the subject of crimes themselves, they are adhering to the code of silence and refusing to tell police who the perpetrator was.<sup>47</sup> When police asked a teenager who shot him, he responded, "I'm not snitchin'".<sup>48</sup>

These news stories demonstrate how widespread the Stop Snitching movement has become. But more importantly, they indicate that the epidemic is having real and palpable effects. This is not just some imagined fad or a quirky subset of hip-hop culture. The Stop Snitching movement has permeated the streets of major cities and is actually hindering the success rates of prosecutors.<sup>49</sup> District Attorney Kamala D. Harris of San Francisco, California stated: "Without witnesses coming forward to provide information leading to the arrest and prosecution of violent criminals, law enforcement cannot apprehend and prosecute those accused of serious and violent

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<sup>43</sup> Tina Griego, *Parents Grieve, Make Room for Ashes of Their Dead Sons*, ROCKY MOUNTAIN NEWS, Aug. 16, 2007, at 46.

<sup>44</sup> *Few Who Saw Fatal Shooting Coming Forward*, DALLAS MORNING NEWS, Aug. 16, 2007.

<sup>45</sup> Editorial, 'Stop Snitchin': When does it End?, PRESS OF ATLANTIC CITY, Aug. 12, 2007, at A12.

<sup>46</sup> Johnson, *supra* note 5.

<sup>47</sup> Grace, *supra* note 39.

<sup>48</sup> *Id.*

<sup>49</sup> *Witness Security and Protection Act, COPS Improvement Act, and the "John R. Justice Prosecutors and Defenders Incentive Act of 2007": Hearing on H.R. 933, H.R. 1700, and H.R. 916 Before the H. Comm. on the Judiciary, 110th Cong. (2007)* (statement of the Honorable Kamala D. Harris, District Attorney of the City and County of San Francisco, California and Member of the Board of Directors, National District Attorneys Association) [hereinafter Harris Testimony].

crimes.”<sup>50</sup> When our adversarial judicial system is largely based on testifying witnesses, the prosecutorial process is drastically undermined by the lack of people willing to come forward with crucial information.<sup>51</sup> In an urgent plea to the community, the chief prosecutor of Dallas’s gang unit asserted, “[w]e cannot lower the crime rate without the assistance of the community . . . . We cannot prosecute without witnesses.”<sup>52</sup> A prosecutor from Philadelphia whose case was dismissed due to a witness who refused to snitch said, “[i]n almost every one of my homicides, this happens: ‘I don’t know nothin’ about nothin’.’ There is this attitude, ‘Don’t be a snitch.’ And it’s condoned by the community.”<sup>53</sup> The reports from Baltimore show that 90% of homicide prosecutions involve some form of witness intimidation.<sup>54</sup> With prosecutors from San Francisco to Baltimore worried about their ability to convict, it is clear that a counter-movement to Stop Snitching is needed to preserve the effectiveness of the United States trial system.

### C. Keep Talking: Trying to Counter the Stop Snitching Movement

Ironically, Baltimore officials were somewhat proud of the 2004 DVD since they thought it created a perfect opportunity to “raise awareness about witness intimidation.”<sup>55</sup> Maryland State Attorney Patricia Jessamy used the momentum from the DVD to pass tougher witness intimidation laws, which made the offense a felony, subject to up to twenty years imprisonment.<sup>56</sup> Baltimore even released its own video called, “Keep Talking,” advocating

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<sup>50</sup> *Id.* D.A. Harris also commented that prosecutors from across the nation generally believe that witness intimidation stands as the biggest hurdle against successful gang prosecutions. *Id.*

<sup>51</sup> *Id.* See also Kahn, *supra* note 5, at 90 (reporting that after a key prosecution witness was ejected from the courtroom for allegedly intimidating others, the prosecution had to drop the trial charges); Ann Ditkoff, *Bloodletting: Can Anything be Done to Bring Baltimore’s Homicide Rate Down?*, BALT. CITY PAPER, Jan. 23, 2008 (noting the difficulties posed on the trial system if there is a lack of witnesses).

<sup>52</sup> *Few Who Saw Fatal Shooting Coming Forward*, *supra* note 44.

<sup>53</sup> Hampson, *supra* note 12.

<sup>54</sup> Harris Testimony, *supra* note 49.

<sup>55</sup> Kahn, *supra* note 5, at 87. The State’s Attorney for Baltimore City, Patricia Jessamy, reported that she tried to use the public outrage over the DVD as the “impetus to confront the problem at the time.” Brendan Kearney, *Death Spurs Renewed Call for Help for Witness Protection Bill for U.S.*, DAILY REC. (Baltimore), July 17, 2007. Jessamy stated, “We used it to our advantage . . . [i]t’s like if someone hands you lemons, make lemonade.” *Id.*

<sup>56</sup> MD. CODE ANN., CRIM. LAW. § 9-302(c)(2) (LexisNexis 2007); Fox Butterfield, *Guns and Jeers Used by Gangs to Buy Silence*, N.Y. TIMES, Jan. 16, 2005, at A1.

cooperation with the police.<sup>57</sup> Yet despite their efforts, Baltimore's homicides are still rising at record rates.<sup>58</sup>

Efforts have been made to pull the shirts from store shelves—but with mixed results. Retailers in Baltimore are resisting requests for them to stop selling the t-shirts, claiming that they are just fashion.<sup>59</sup> The shirts prove to be extremely *popular* fashion: stores throughout the region are nearly sold out of their entire stock.<sup>60</sup> The money-making ability of the message (and the t-shirt) makes it unlikely that store-owners will voluntarily stop carrying them.<sup>61</sup> In defense of the merchandise, the retailers point the finger back at the public: “[Our store] simply provides our customers with the fashion they request . . . [our store] does not encourage or support any behavior associated with any of these images.”<sup>62</sup> Of the three cities that have tried to ban the sale

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<sup>57</sup> Kahn, *supra* note 5, at 87.

<sup>58</sup> Gregory, *supra* note 7. In 2007, Baltimore's homicide rate was forty-four per 100,000 residents, which is more than three times the national rate of around fourteen per 100,000 residents. Ditkoff, *supra* note 51. While the national homicide rate is decreasing, Baltimore's is still on the rise. *Id.*

<sup>59</sup> White, *supra* note 26.

<sup>60</sup> *Id.* In Omaha, Nebraska, ten-dollar t-shirts that read, “Kill a snitch save a life” have been selling at a local mall. Grace, *supra* note 39. The principal of a nearby high school implemented her own counter-movement against the message, forcing students who came to school wearing the t-shirts to put on a ‘loaner’ one from a supply of shirts kept in her office. *Id.*

<sup>61</sup> A particular Stop Snitching t-shirt design was recently the subject of a copyright infringement claim (although it was eventually dismissed). *Caldwell v. Rudnick*, No. 05 Civ. 7382, 2006 WL 2109454, at \*1 (S.D.N.Y. July 26, 2006). The opinion in *Caldwell* also described some of the other designs: “[One] graphic features a circular ‘DO NOT ENTER’ sign except that the word ‘SNITCH’ replaces the word ‘ENTER.’ [Another] design features a rectangular ‘NO PARKING ANYTIME’ sign with the word ‘SNITCHING’ replacing the word ‘PARKING.’” *Id.* at \*2 n.3. On the back of one of the parties’ t-shirts, the following text was displayed:

The Department of Hood Affairs is an urban shirt company established in 2005 for the purpose of citing and obstructing any potential communication violations in the inner cities of America. The Department of Hood Affairs was specifically designed to enforce the following rules of society:

1. DO NOT SNITCH
2. STOP SNITCHING
3. NO SNITCHING ANYTIME

These three violations consist of divulging unnecessary information willingly and are punishable by fines of up to \$250,000 or greater.

*Id.* at ¶ 2 n. 3.

<sup>62</sup> White, *supra* note 26.

of Stop Snitching apparel—Philadelphia, Boston, and Washington D.C.—only the last has succeeded.<sup>63</sup>

Yet there is skepticism that even if the t-shirts are banned and the music is silenced, it will automatically alleviate the chronic predicament of witness intimidation. Some are calling for more community-based initiatives<sup>64</sup> while others still are asserting that the only viable solution is a complete cultural transformation of America's inner cities.<sup>65</sup> Multiple cities, like Philadelphia, are trying to start their own "start snitching" campaigns; however, Philadelphia also has plans to set up 250 surveillance cameras to catch crime.<sup>66</sup> City officials there claim that "[a] camera is a witness that will not be intimidated."<sup>67</sup> Either way, district attorneys are feeling the pressure to remedy the growing problem with both short- and long-term solutions. With these traditional methods of prevention not having the desired result; law enforcement and prosecutors are keenly aware of the need for a different solution—and so they are turning to the laws, but with disappointing results.

## II. STOP SNITCHING CLASHES WITH THE LAW

Since the First Amendment heavily protects artistic speech and the free expression of ideas, countering the Stop Snitching movement through this amendment alone is nearly impossible. State laws that would be used to prosecute supporters of the movement are also somewhat unhelpful because it is difficult to criminalize *nonaction*. Even still, witness protection and obstruction of justice laws are not the proper solution to the problem, since neither makes any attempt to improve the mistrust the inner city citizens have toward law enforcement.

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<sup>63</sup> Kahn, *supra* note 5, at 92. However, some courts in Massachusetts have been successful in prohibiting people who wear the Stop Snitching t-shirts from entering the courtroom. David Linton, *DA Sutter Defends Tough Stance*, SUN CHRON. (Boston), Jan. 13, 2008.

<sup>64</sup> Gregory, *supra* note 7. Specifically, the article notes that another option being considered by city officials is to develop "a community-based solution beyond simply shaming residents."

<sup>65</sup> Kahn, *supra* note 5, at 92. Some people characterize "new laws" and "more money" toward witness protection as only "blunt instruments of policy-makers." *Id.* Instead of only "chip[ping] away at the edges of the problem," Mr. Kahn contends that a cultural transformation is necessary to "reduce witnesses' reluctance to participate in the judicial process [which requires] something beyond the abilities of cops and courts." *Id.*

<sup>66</sup> Johnson, *supra* note 5.

<sup>67</sup> *Id.*

A. “[O]ne man’s vulgarity is another’s lyric”.<sup>68</sup> *The Failure of the First Amendment*

When a witness came into court wearing a Stop Snitching t-shirt, the prosecutor asked the witness to take off his hat and to reverse the shirt.<sup>69</sup> However, the witness refused, citing the First Amendment.<sup>70</sup> Indeed, this amendment, which protects the free expression of speech and conduct, proves to be a powerful shield to the Stop Snitching movement, since the medium by which the message is spread is mostly through music and clothing.<sup>71</sup> Rap lyrics, like other forms of artistic expression, generally fall within the protection of the First Amendment.<sup>72</sup> In striking down an ordinance that sanctioned exotic dancing, the Supreme Court in *Schad v. Borough of Mount Ephraim* reasoned that “[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, *and live entertainment, such as musical and dramatic works*, fall within the First Amendment guarantee.”<sup>73</sup>

The freedom to wear a t-shirt advocating the Stop Snitching movement would also be shielded, since it would be considered expressive conduct.<sup>74</sup> The Supreme Court has held that “[t]he First Amendment generally prevents government from proscribing speech, [...] or *even expressive conduct*, [...] because of disapproval of the ideas expressed.”<sup>75</sup> Thus, Stop Snitching supporters have two powerful Constitutional protections in their back pockets: first, that artistic speech is heavily protected; and second, that “[c]ontent-based regulations are presumptively invalid.”<sup>76</sup> In other words,

<sup>68</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971). (Harlan, J., majority).

<sup>69</sup> Hampson, *supra* note 12.

<sup>70</sup> *Id.* The First Amendment states, in relevant part: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. CONST. amend. I.

<sup>71</sup> See *supra* note 4 and accompanying text.

<sup>72</sup> *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981).

<sup>73</sup> *Id.* (emphasis added). For further comment on the applicability of the First Amendment to music, see *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). In his majority opinion, Justice Souter noted that since the Constitution “looks beyond written or spoken words as mediums of expression,” then the First Amendment would generally apply to the banners *and songs* during a parade. *Id.* He also reasoned that the First Amendment would unquestionably shield music. *Id.*

<sup>74</sup> *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).

<sup>75</sup> *Id.* (emphasis added) (internal citations omitted).

<sup>76</sup> *Id.*

states cannot simply criminalize Stop Snitching lyrics and apparel because law enforcement dislikes the message.<sup>77</sup>

To counter the spread of the Stop Snitching movement by directly regulating the speech or expressive conduct of its proponents is difficult if not impossible. One theoretical exception to the First Amendment is the prohibition of “fighting words,” which constitutes speech inherently likely to provoke a violent reaction from the ordinary citizen.<sup>78</sup> However, it is unlikely that the intended effect of Stop Snitching meets the threshold requirement because, inherently, Stop Snitching advocates non-action. It would be nonsensical to argue that *not* talking to the police and *not* coming forth with information would necessarily invoke violence or provoke a violent reaction.<sup>79</sup> It is precisely this ‘non-action’ that makes Stop Snitching so challenging to counter through traditional legislative means, either through Constitutional measures, or through state statutes such as obstruction of justice laws.

### B. *The Current Law: Obstruction of Justice*

There are two areas of law that would be theoretically applicable in criminalizing the conduct of either those who refuse to talk to the police during an investigation, or those who actually retaliate against witnesses who agree to help law enforcement: obstruction of justice and witness protection laws, respectively. Yet the statutory language within these two areas of law

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<sup>77</sup> *Cohen v. California*, 403 U.S. 15, 26 (1971). In *Cohen*, the defendant walked into a courtroom wearing a jacket with the logo, “Fuck the Draft” plainly visible. *Id.* at 16. In overturning the defendant’s conviction for disturbing the peace, the Court reasoned, first, that under the First Amendment, the state may not criminalize the unpleasant use of this swear word. *Id.* at 26. Most notably, the Court concluded that this particular expression did not fall into the ‘fighting words’ exception to the First Amendment: “No individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a direct personal insult.” *Id.* at 20.

<sup>78</sup> The original standard for what constituted “fighting words” stated: “[Fighting words] include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

<sup>79</sup> Furthermore, by even a cursory view of the Court’s interpretation of the *Chaplinsky* standard, it is clear that the ‘fighting words’ exception is an unusable option. In the near seventy years since *Chaplinsky* was decided, the Supreme Court has not affirmed a ‘fighting words’ conviction. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1002 (3d ed. 2006). The Court has essentially rendered the ‘fighting words’ exception null, without ever explicitly overruling the *Chaplinsky* rule. *Id.*

still prohibits only overt acts, and the ability for these statutes to criminalize what Stop Snitching advocates—willful silence—generally does not exist.

The first problem to address due to the Stop Snitching movement is the lack of witnesses coming forward to help police.<sup>80</sup> Most current state laws that criminalize obstruction of justice have set an *actus reus* threshold that mere willful silence cannot meet.<sup>81</sup> For example, in Alabama's obstructing

<sup>80</sup> The second problem is that the current witness protection laws will punish Stop Snitching supporters only if these individuals actually *threaten or retaliate* against those who are expected to testify at a judicial proceeding. *See, e.g.*, ALA. CODE §§ 13A-10-123, 13A-6-25 (LexisNexis 2005); ALASKA STAT. § 11.56.540 (2008); ARIZ. REV. STAT. ANN. §§ 13-2802, 2804 (2008); ARK. CODE ANN. §§ 5-53-109, 5-53-114 (2005); CAL. PENAL CODE §§ 136.1, 138, 139, 140 (West 2009); COLO. REV. STAT. §§ 18-8-704, 18-8-705, 18-8-707 (2007); CONN. GEN. STAT. ANN. §§ 53a-151, 53a-151a (West 2007); DEL. CODE ANN. tit. 11, §§ 3532, 3533 (2007); FLA. STAT. ANN. § 914.22 (West 2009); GA. CODE ANN. § 16-10-93 (2007); HAW. REV. STAT. §§ 710-1071, 710-1072 (2008); IDAHO CODE ANN. § 18-2605 (2001); 720 ILL. COMP. STAT. ANN. 5/32-4 (West 2007); MASS. ANN. LAWS ch. 268 § 13b (LexisNexis 2008); NEV. REV. STAT. ANN. § 199.305 (LexisNexis 2006); N.M. STAT. § 30-24-3 (LexisNexis 2004); 18 PA CONS. STAT. ANN. § 4953 (West 2008); S.D. CODIFIED LAWS § 22-11-19 (2006); TEX. PENAL CODE ANN. § 36.06 (Vernon 2008); WYO. STAT. ANN. § 6-5-305 (2007). The federal witness protection law is codified at 18 U.S.C. § 1512 (2003). It prohibits anyone from killing or attempting to kill another person for the purpose of preventing that person from giving testimony at an official proceeding. § 1512(a)(1)(A).

<sup>81</sup> The following fifteen statutes require a showing of intimidation, physical force, or the equivalent thereof: ALA. CODE § 13A-10-2 (LexisNexis 2005); ALASKA STAT. § 11.56.510 (2008); ARIZ. REV. STAT. ANN. § 13-2409 (2008); IOWA CODE ANN. § 719.3 (West 2003); KY. REV. STAT. ANN. § 519.020 (LexisNexis 1999); ME. REV. STAT. ANN. tit. 17, § 751 (2006); MD. CODE ANN., CRIM. LAW § 9-306 (LexisNexis 2002); MISS. CODE ANN. § 97-9-103 (West 2008); MONT. CODE ANN. § 45-7-303 (2006); N.C. GEN. STAT. § 14-226 (2007); N.D. CENT. CODE § 12.1-09-01 (2006); OHIO REV. CODE ANN. § 2921.32 (West 2006); UTAH CODE ANN. § 76-8-306 (2002); VT. STAT. ANN. tit. 13, § 3015 (2006); D.C. CODE ANN. § 5-117.04 (LexisNexis 2001).

The federal statute mirrors the *actus reus* set forth by these states. 18 U.S.C. § 1512(a)(2) (2006) ("Whoever uses physical force or the threat of physical force against any person...").

Most obstruction of justice state statutes are high level misdemeanors. *See, e.g.*, ALA. CODE § 13A-10-2 (LexisNexis 2008) (Class A misdemeanor); ARK. CODE ANN. § 5-54-102 (2007) (Class A or Class C misdemeanor); FLA. STAT. ANN. § 843.02 (West 2000) (misdemeanor in the first degree); GA. CODE ANN. § 16-10-24 (2007) (misdemeanor); IOWA CODE ANN. § 719.3 (West 2003) (aggravated misdemeanor); KY. REV. STAT. ANN. § 519.020 (LexisNexis 1999) (Class A misdemeanor); MD. CODE ANN., CRIM. LAW § 9-306 (LexisNexis 2002) (misdemeanor); N.C. GEN. STAT. § 14-223 (2007) (Class 2 misdemeanor); N.D. CENT. CODE § 12.1-08-01 (2006) (class A misdemeanor); OKLA. STAT. tit. 21, § 540 (2006) (misdemeanor); OR. REV. STAT. § 162.235 (2007) (Class A misdemeanor); 18 PA. CONS. STAT. ANN. § 5101 (West 2008) (misdemeanor of the second degree); S.D. CODIFIED LAWS § 22-11-6 (2006) (Class 1 misdemeanor); TENN. CODE ANN. § 39-16-602 (1999) (Class A misdemeanor); VA. CODE ANN. § 18.2-460

government operations statute, individuals are penalized only if they intentionally obstruct, impair, or hinder a governmental function “by means of intimidation, physical force or interference or by any other independently unlawful act . . . .”<sup>82</sup> The correlating statute in Iowa is even stricter, requiring that a suspect either destroy, alter, conceal, or disguise physical evidence or induce another witness to leave the state, hide, or fail to answer a subpoena.<sup>83</sup> Similarly, Kentucky’s statute for obstructing governmental operations states that, “A person is guilty . . . when he intentionally obstructs, impairs or hinders the performance of a governmental function by using or threatening to use violence, force or physical interference.”<sup>84</sup> With a charge of obstruction of justice triggered only by threats of force or actual violence, it is difficult to see how these laws can be extended to penalize those who willfully refuse to speak to police. Although people who follow the Stop Snitching movement may be intentionally hindering a criminal investigation—their *inaction* does not meet the *actus reus* requirements of these states’ statutes.

By lowering the *actus reus* requirement, a few states have passed legislation that could be more viable options in penalizing those who refuse to tell the police their belief of a suspected crime.<sup>85</sup> Some states only penalize

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(2007) (Class 1 misdemeanor); WASH. REV. CODE ANN. § 9A.76.020 (West 2002) (gross misdemeanor).

Only a few states elevate their obstruction of justice violations to felonies—and most do so because the statutory language itself prohibits behavior more akin to witness intimidation. *See, e.g.*, ALASKA STAT. § 11.56.510 (2008) (class B felony); ARIZ. REV. STAT. ANN. § 13-2409 (West 2008) (either class 3 or class 5 felony); NEV. REV. STAT. § 199.305 (LexisNexis 2006) (category D felony); OHIO REV. CODE ANN. § 2921.32 (West 2006) (felony of the fourth degree); S.D. CODIFIED LAWS § 22-11-19 (2006) (Class 4 Felony); WIS. STAT. ANN. § 946.65 (West 2004) (Class I felony); WYO. STAT. ANN. § 6-5-305 (2004) (felony). Still others elevate the offense to a felony for repeat offenders. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.478a (West 2004) (misdemeanor for first time violators only).

<sup>82</sup> ALA. CODE § 13A-10-2 (LexisNexis 2008). For similarly worded statutes, see ARIZ. REV. STAT. ANN. § 13-2402 (2008) (“A person commits obstructing governmental operations if, by using or threatening to use violence or physical force . . .”) and MISS. CODE ANN. § 97-9-103 (West 2008) (requiring “force, deception or intimidation”).

<sup>83</sup> IOWA CODE § 719.3 (West 2003).

<sup>84</sup> KY. REV. STATE ANN. § 519.020 (LexisNexis 1999).

<sup>85</sup> *See* COLO. REV. STAT. § 18-8-115 (2007); CONN. GEN. STAT. § 53a-167b (2007); DEL. CODE ANN. tit. 11, § 1241 (2007); IDAHO CODE ANN. § 18-705 (2004); 720 ILL. COMP. STAT. 5/31-4(c) (West 2003); IND. CODE § 35-44-3-4 (B); IOWA CODE § 719.3; LA. REV. STAT. ANN. § 14:130.1(2)(e) (2002); MO. REV. STAT. ANN. § 575.190 (West 2003); NEB. REV. STAT. ANN. § 28-903 (LexisNexis 2003); W.VA. CODE § 61-5-14 (2005).

However, ‘duty to report’ statutes usually apply only to medical professionals or victim counselors. *See, e.g.*, ALA. CODE § 26-14-3 (2008) (all medical practitioners,



those who actively obstruct a police officer.<sup>86</sup> But at least eleven other states have codified statutes that criminalize the refusal to aid a police officer.<sup>87</sup> These laws generally require the public to assist in the officer's lawful duties when called upon to do so.

At least four states have passed laws that require a witness of a crime to actually report it—or at least punish those who have knowledge but who leave the state.<sup>88</sup> Colorado has expressly enacted a statute that establishes a duty to report a crime when citizens have reasonable grounds to believe that

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social workers, and clergy have duty to report); OHIO REV. CODE ANN. § 2921.22 (West 2006) (duty to report felony conferred to physician, practitioner, or nurse). The duty to report also is contingent on the type of crime, with a heavy emphasis on reporting child abuse. *See, e.g.*, ALA. CODE § 26-14-3 (West 2007) (mandatory reporting for child abuse, neglect, etc.); FLA. STAT. § 794.027 (2000) (duty to report a sexual assault); KY. REV. STAT. ANN. § 620.030 (LexisNexis 2008) (all individuals have duty to report child abuse if belief supported by reasonable cause).

<sup>86</sup> *See, e.g.*, D.C. CODE § 5-117.04 (2003) (willful interference with police); MINN. STAT. ANN. § 609.50 (West 2006) (obstructing, resisting, or interfering with police); R.I. GEN. LAWS § 11-32-1 (2006) (obstructing police in execution of his or her office or duty); TEX. PENAL CODE ANN. § 38.15 (Vernon 2008) (“interrupts, disrupts, impedes, or otherwise interferes with . . . a peace officer”).

<sup>87</sup> CONN. GEN. STAT. § 53a-167b (West 2007) (refusal to assist policeman in execution of such policemen's duties); DEL. CODE ANN. tit. 11, § 1241 (2007) (“person unreasonably fails or refuses to aid the police officer in effecting an arrest, or in preventing the commission by another person of any offense”); GA. CODE ANN. § 16-10-24 (2007) (“knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties. . . .”); IOWA CODE ANN. § 719.2 (West 2003) (“A person who, unreasonably and without lawful cause, refuses or neglects to render assistance when so requested . . . .”); NEB. REV. STAT. § 28-903 (2003) (“unreasonably refuses or fails to aid such peace officer”); N.M. STAT. § 30-22-2 (LexisNexis 2004) (“refusing to assist any peace officer in the preservation of the peace when called upon by such officer . . . .”); N.Y. PENAL LAW § 195.10 (McKinney 2004) (“unreasonably fails or refuses to aid such peace or a police officer in effecting an arrest”); OKLA. STAT. tit. 21, § 537 (2006) (“willfully neglects or refuses to aid such officer. . . .”); OR. REV. STAT. § 162.245 (2005) (refusing to assist peace officer in effecting an authorized arrest); WASH. REV. CODE § 9A.76.030 (2006) (“unreasonably refuses or fails to summon aid for such peace officer”); W. VA. CODE ANN. § 61-5-14 (LexisNexis 2002) (neglect to assist police officer in a criminal case).

<sup>88</sup> COLO. REV. STAT. § 18-8-115; 720 ILL. COMP. STAT. 5/31-4(c); MASS. GEN. LAWS ch. 268, § 40; MO. REV. STAT. § 575.190. The law from Illinois is more able to deal with Stop Snitching followers, since it criminalizes individuals who knowingly possess knowledge material to the subject at issue, but who leave the state or conceal themselves. 720 ILL. COMP. STAT. 5/31-4(c). This Illinois statutory provision states in part: “A person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he knowingly commits any of the following acts: . . . Possessing knowledge material to the subject at issue, he leaves the State or conceals himself.”

one has been committed.<sup>89</sup> Missouri's statute comes closest to addressing the inaction problem under the Stop Snitching movement. It states in relevant part:

A person commits the crime of refusal to identify as a witness if, *knowing he has witnessed any portion of a crime*, or of any other incident resulting in physical injury or substantial property damage, upon demand by a law enforcement officer engaged in the performance of his official duties, *he refuses to report or gives a false report of his name and present address to such officer.*<sup>90</sup>

Massachusetts, as well, has passed a similar law calling for whoever knows that a person is a victim of a serious crime of violence, "shall . . . report said crime to an appropriate law enforcement official as soon as reasonably practicable."<sup>91</sup> According to the plain language, each of these statutes at least has the capacity in some way to address aspects of the Stop Snitching movements. Leaving the state while in the possession of information, failing to report a crime, or witnessing a crime and not coming forward do hit at the core of the Stop Snitching phenomenon. Although the plain text of the statutes seem to allow legal sanction toward witnesses who fail to talk to the police, no published opinions in each of the three states have used these statutes to penalize non-disclosure.<sup>92</sup> It will be up to the individual state courts to determine whether the laws will be used in that capacity.

Yet the more fundamental problem with using state laws to counter the Stop Snitching movement is not necessarily due to ineffective drafting, nor is it even due to language of the statutes already enacted. Even if these three laws from Colorado, Missouri, and Massachusetts are effectively used to prosecute those who refuse to talk to the police, the problem of actually finding witnesses still remains. If the police are already having difficulty locating witnesses just to *solve* crimes, there is no reason to think that it will be any easier to find witnesses in order to *prosecute* them. Thus, the ability for state statutes to remedy the Stop Snitching movement remains unconvincing. Instead of turning against witnesses, police should be building trust with them.

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<sup>89</sup> COLO. REV. STAT. § 18-8-115.

<sup>90</sup> MO. REV. STAT. § 575.190 (emphasis added).

<sup>91</sup> MASS. GEN. LAWS ch. 268, § 40.

<sup>92</sup> No published opinions as of March 7, 2008 have, to this author's knowledge, used the statutes in this manner.

### III. STOP SNITCHING IS A MANIFESTATION OF DISTRUST BETWEEN THE PUBLIC AND THE LAW

Much of the desire to follow the Stop Snitching movement is fueled by the catalyst of distrust.<sup>93</sup> This sentiment is targeted mostly against the police; however, the real causes for the distrust are rooted in the decision-making of the United States Supreme Court<sup>94</sup>—specifically stemming from Court's Fourth Amendment jurisprudence. Only by remedying this deception can the Stop Snitching movement be brought to a halt.

#### A. *It Comes Down to Trust*

With lawyers realizing that current laws are not equipped to deal with the negative ramifications of Stop Snitching, they have begun to push for tougher legislation in the form of longer penalties for witness intimidation violations,<sup>95</sup> and federal funding for state-based witness protection programs.<sup>96</sup> Supporters of such legislation, such as District Attorney Harris from San Francisco, hope that heavier penalties will eventually deter the violent retaliation that witnesses face.<sup>97</sup> These statutes that create a state-based witness protection program fail to address the Stop Snitching problem directly.<sup>98</sup> Although witness protection programs ostensibly serve a legitimate purpose, they are mostly reactionary legislation to the type of

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<sup>93</sup> See Grace, *supra* note 39. A twenty-three year old man explained what he called a paradox: "an ever-present police force that harasses residents such as him but doesn't stop crime." *Id.* Distrust against the police is rampant and pervasive. *Id.* Others have stated that "[a] system of injustices, including racial profiling, sentencing disparities and police aggressiveness in certain neighborhoods has built up decades of distrust." Editorial, *Snitchers Needed in Tukwila Case*, SEATTLE TIMES, Apr. 17, 2008, available at [http://seattletimes.nwsources.com/html/editorialsopinion/2004353973\\_snitched17.html](http://seattletimes.nwsources.com/html/editorialsopinion/2004353973_snitched17.html).

<sup>94</sup> TRUST IN THE LAW, *supra* note 17, at 17.

<sup>95</sup> MD. CODE ANN., CRIM. LAW § 9-302(c)(2); see Butterfield, *supra* note 56.

<sup>96</sup> Witness Protection Enhancement Act of 2007, H.R. 3376, 110th Cong. (2007); Witness Security and Protection Act of 2007, H.R. 933, 110th Cong. (2007). Specifically, these proposed statutes would establish a short-term witness protection program within the already existing United States Marshals Service in order to aid local prosecutors protect their witnesses who must testify in serious criminal cases.

<sup>97</sup> Harris Testimony, *supra* note 49. D.A. Harris supported her testimony by noting the degree to which fear furthers the reluctance of potential witnesses: "There is a very high level of fear of retaliation, fear which may often be driven by recent, high-profile crimes committed against witnesses who participated in witness relocation and protection programs." *Id.* at 5.

<sup>98</sup> This is similar to the reason why state statutes against obstruction of justice fail as well. See *infra* Part II.B.

retaliation that Stop Snitching promotes. These statutes fail to prohibit the Stop Snitching trend not only because the statutory language itself is inept at criminalizing non-action, but because the current legislatures fail to address the true problem that spurred the Stop Snitching movement in the first place: distrust. City leaders need to remedy this distrust, rather than pursue options that may only increase the resentment.<sup>99</sup>

Overextending the laws and punishing those who adhere to the Stop Snitching movement will only generate more animosity. Baltimore State's Attorney has even suggested, as a last resort, keeping reluctant witnesses in jail until trial, even though this could be for an extended period of time.<sup>100</sup> Although a deprivation of liberty is somewhat less severe than a full-blown criminal prosecution, it still would only have the adverse effect of inducing potential witnesses not to come forward to begin with. It is hard to imagine why a witness would come forward with information of a crime when there remains the possibility that they would be put in jail until the trial should they express reluctance toward testifying. The goal of law enforcement is not just to force people to comply when they are in the presence of police; rather the objective is to build ongoing, voluntary compliance.<sup>101</sup> Psychologists Tom Tyler and Yuen Huo argue that a regulation system that is perceived as fair and trustworthy will induce the public to "[take] on personal responsibility for adhering to those decisions and [do] so even when legal authorities are unlikely to still be watching or sanctioning them."<sup>102</sup> Drawing from their psychology backgrounds, Drs. Tyler and Huo contend that trust

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<sup>99</sup> This distrust is not unnoticed by members of law enforcement. Police told journalists from Indianapolis that "[d]istrust of police is a key problem that needs to be overcome." Vic Ryckaert, *Police Hope Cooperation from Public Continues*, INDIANAPOLIS STAR, Feb. 11, 2008, at A1. Indianapolis Public Schools Police Chief Steve Garner stated that this is a problem mostly felt by minorities: "There's a distrust of police . . . I've seen what I would call a wall built up." *Id.* at A6.

<sup>100</sup> Ditkoff, *supra* note 51. In response to this, defense attorney Margaret Mead commented, "Have you been over to the city jail? Talk about a place of witness intimidation. If I thought I was going to get locked up in Baltimore City Jail, Mr. Prosecutor, I'm going to say whatever you want me to say." *Id.*

<sup>101</sup> TRUST IN THE LAW, *supra* note 17, at 7.

<sup>102</sup> *Id.* The idea of fairness directly feeds into the notion of trust in the law. In a sociological study of street criminals and the code on the street, Richard Rosenfeld interviewed twenty active street offenders. Richard Rosenfeld, et. al., *Snitching and the Code on the Street*, 43 BRIT. J. CRIMINOLOGY 291, 295 (2003). He found that most offenders did not dispute the police's authority to patrol, investigate, and arrest; however these interviewees perceived most officers as "[spending] most of their time engaging in unjustified intrusions on the civil liberties . . . specifically, their right to be on the street." *Id.* It is these sorts of perceived "unjustified intrusions" that support the Stop Snitching movement.

within the law can be built by increasing the quality of the decision-making process and then virtuously applying the resultant decisions on the public.<sup>103</sup>

In the context of Supreme Court decisions, Dr. Tyler has argued that “an examination of the psychology of procedural justice suggests that judgments about the [Supreme] Court's neutrality are central to evaluations of the legitimacy of the Court's decisionmaking procedures.”<sup>104</sup> In other words, the logical process and reasoning that the Supreme Court uses to formulate its holdings should be sound in order for trust to develop between the public and the law.<sup>105</sup> Of course, the vast majority of the public are not scrutinizing Supreme Court decisions; however, the Fourth Amendment is unique in that its rule of law is felt nearly every time a person interacts with a police officer. The sheer breadth of the Fourth Amendment covers common occurrences that even the most law-abiding citizen would not be able to avoid.<sup>106</sup> By being the subject of police power, the public indubitably and perhaps inadvertently learns what the Supreme Court has ruled. As Baltimore's State's Attorney noted, “distrust between citizens and the law can affect all aspects of law enforcement in the city.”<sup>107</sup> Once this distrust builds through repeated negative experiences with the police, it becomes difficult to overcome that resentment when citizens are called upon to act as jurors, or arguably, when they are called upon to help the police in solving crime.<sup>108</sup>

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<sup>103</sup> TRUST IN THE LAW, *supra* note 17, at 7.

<sup>104</sup> Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 798 (1994) (ultimately arguing that the amount of trust placed in the Supreme Court's power and decision making process substantially affects the amount of deference given to the Court's holding in abortion rights).

<sup>105</sup> In a complex study, the psychologists found support for their hypothesis that when police and the courts act in a way that are perceived as procedurally fair, then the public is more apt to voluntarily give their cooperation—either when citizens are being protected or being regulated by the police. TRUST IN THE LAW, *supra* note 17, at 52–57. The results from this study show that “procedural justice was the dominant factor in shaping people's reactions to authorities in personal encounters with them . . .” *Id.* at 56.

<sup>106</sup> The Fourth Amendment has been paramount in governing at least two every day aspects of life: traffic stops and airline baggage searches. In Ohio alone, there were 748,655 traffic stops made by Ohio State Highway Patrol between January and June 2007. Ohio State Highway Patrol, Traffic Stop Data, [http://statepatrol.ohio.gov/statistics/data/2007\\_3T.htm](http://statepatrol.ohio.gov/statistics/data/2007_3T.htm) (last visited Feb. 3, 2008). In 2000, there were a total number of 638,902,933 enplaned passengers across all carriers. U.S. DEP'T. OF TRANSP., AIRPORT ACTIVITY STATISTICS OF CERTIFICATED AIR CARRIERS: SUMMARY TABLES 9 (2000), available at [http://www.bts.gov/publications/airport\\_activity\\_statistics\\_of\\_certificated\\_air\\_carriers/2000/entire.pdf](http://www.bts.gov/publications/airport_activity_statistics_of_certificated_air_carriers/2000/entire.pdf).

<sup>107</sup> Ditkoff, *supra* note 51.

<sup>108</sup> *Id.*

In the 1990s, a significant amount of legal scholarship was written about the distrust that African Americans had engendered toward law enforcement.<sup>109</sup> Two areas where the Fourth Amendment has allowed for the use of police deception are pre-textual vehicle stops and the seizure of people on the street.<sup>110</sup> The Fourth Amendment facially mandates that all warrantless searches or seizures are per se unreasonable; yet through a complicated path of exceptions, this once-strong rule has severely lost its potency.<sup>111</sup> In the process, the Supreme Court held that the constitutional reasonableness of a traffic stop does not take into consideration the actual motivations of the individual policeman,<sup>112</sup> and the Court has established that a person is legally seized when he or she does not feel free to leave a policeman's presence due

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<sup>109</sup> See, e.g., Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 255 (1991) [hereinafter Maclin, *Black and Blue*]; see also, Harris, *supra* note 18, at 308. A complete analysis of the causes of distrust are beyond the scope of this Note; however, it remains clear that this hostility had been identified and cautioned for at least a decade before Stop Snitching reached its tipping point.

<sup>110</sup> Police are often able to craft elaborate lies in order to elicit a confession from a suspect. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969). In *Frazier*, the Court held that simply lying to the suspect will not render an otherwise voluntary confession automatically unconstitutional under the due process clause. *Id.* This same policy was later reinforced when the Court held that if there were no other coercive factors influencing the confession, then using deception was not in violation of the suspect's *Miranda* rights. *Illinois v. Perkins*, 496 U.S. 292, 297 (1990). Police generally believe that deceptive interrogation is necessary due to the suspect's inherent reluctance to respond to direct questioning. Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 787 (1997). Falsely stating to a suspect that a co-conspirator had already confessed is acceptable use of police deception. *Frazier*, 394 U.S. at 737–38. Police are allowed to tell individuals that there is strong incriminating evidence against them, even if none exists. *State v. Patton*, 826 A.2d 783, 793 (N.J. Super. 2003) (but making clear that police may not falsely create fake evidence to use in interrogation). Investigators are even permitted (under *Miranda*) to pose as cellmates and purposely elicit incriminating statements from the suspect. *Perkins*, 496 U.S. at 296. In the past, however, the Supreme Court has not always been so lenient toward police. See *Spano v. New York*, 360 U.S. 315, 319 (1959). In *Spano*, the police used the suspect's close friend, also a police officer, to tell a series of lies to the suspect in order to elicit a confession. *Id.* These lies included that the suspect was going to lose his job, and that his unemployment would harm his family. *Id.* at 323. The Court concluded that the suspect's "will was overborne by official pressure, fatigue, and sympathy falsely aroused . . ." *Id.* at 323 (emphasis added). Yet even here, deception alone did not lead to an unconstitutional confession per se; it was the combination of multiple factors.

<sup>111</sup> Some of the multiple exceptions to the Fourth Amendment warrant requirement are exigent circumstances, searches incident to lawful arrest, searches of readily mobile vehicles, items in plain view, searches done under consent, protective sweeps, and arrest or automobile inventories.

<sup>112</sup> *Whren v. United States*, 517 U.S. 806, 816–17 (1996).

to force or show of authority.<sup>113</sup> As benign as these two holdings are, the true effect lies between the lines of the written opinions. Both holdings have created gaps through which policemen are legally allowed to use deception against citizens for impermissible reasons—such as race. This Note is neither contending nor assuming that policemen are generally unethical individuals. Instead, it asserts that the Supreme Court has faltered by creating holes in the precedent that *permits the possibility* of misuse. By creating these loopholes, the Supreme Court's ability to garner the public's trust decreases.<sup>114</sup>

### B. Pre-Textual Vehicle Stops are Just the Start

The Supreme Court's unanimous decision in *Whren v. United States* set a precedent for permitting pre-textual stops.<sup>115</sup> The police can now pull over a vehicle for any reason, as long as there was some objective basis why they could have effected the stop.<sup>116</sup> When this holding is combined with the decisions in *Atwater v. City of Lago Vista*<sup>117</sup> and *New York v. Belton*,<sup>118</sup> a startling gap in the Fourth Amendment suddenly becomes clear: police now have a means of lawfully searching a vehicle and seizing its occupants without a warrant, spurred only by a mere hunch.<sup>119</sup>

#### 1. The Pre-Textual Stop is Born

One night in Washington D.C., an unmarked police car driven by a plainclothes officer drove past a Nissan Pathfinder truck carrying youthful looking occupants.<sup>120</sup> The policeman saw the driver look down at his lap, all while remaining stopped at an intersection for an unusual amount of time.<sup>121</sup> The police car did a U-turn toward the Pathfinder, and the truck immediately sped off with a right turn.<sup>122</sup> The officer followed, and while he was

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<sup>113</sup> *United States v. Mendenhall*, 446 U.S. 545, 554 (1980).

<sup>114</sup> See TRUST IN THE LAW, *supra* note 17, at 57.

<sup>115</sup> *Whren*, 517 U.S. at 817.

<sup>116</sup> *Id.*

<sup>117</sup> 532 U.S. 318 (2001).

<sup>118</sup> 453 U.S. 454, 460 (1981).

<sup>119</sup> See David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 272 (1997).

<sup>120</sup> *Whren*, 517 U.S. at 808.

<sup>121</sup> *Id.* The record for the case indicated that the Petitioner had waited at the stop sign for "more than 20 seconds." *Id.*

<sup>122</sup> *Id.*

apprehending the Pathfinder's occupants in a traffic stop, he saw two plastic bags of crack cocaine in Mr. Whren's hands.<sup>123</sup>

The driver moved to suppress the evidence on grounds that the stop of his truck had not been justified by probable cause or even reasonable suspicion of illegal drug activity.<sup>124</sup> However, the Court rejected his arguments and the Justices unanimously decided that probable cause to stop a car is to be judged by a purely objective standard.<sup>125</sup> Specifically, the Court held that "[s]ubjective intentions [of the police officer] play no role in ordinary, probable-cause Fourth Amendment analysis."<sup>126</sup> In other words, courts will not inquire into the 'real' reason an officer pulls over a car, as long as there was a reasonable purpose for the stop—*any* reasonable purpose—as judged by an objective analysis.<sup>127</sup> The petitioner-defendant lost in *Whren* because when he broke the traffic laws, he opened the door to a vehicle stop—even if the stop resulted in seized narcotics rather than a traffic ticket.<sup>128</sup> With this holding, the Court effectively constitutionalized pre-textual vehicle stops.<sup>129</sup>

Although the petitioner-defendant proffered the losing standard in this case,<sup>130</sup> he made a strong argument pointing out a looming loophole in pre-textual stops. The standard adopted by the Court turns a blind eye toward the subjective intentions of the police officer. Therefore, police can now track a vehicle that they have some sort of hunch is involved in illegal activity.<sup>131</sup>

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<sup>123</sup> *Id.* at 808–9.

<sup>124</sup> *Id.* at 809. Probable cause is found when there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 230 (1983). The standard for reasonable suspicion is even less than that of probable cause but must always be something more than a hunch. *Alabama v. White*, 496 U.S. 325, 328–29 (1990). Either standard is not particularly strict—probable cause does *not* "demand any showing that such a belief be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983).

<sup>125</sup> *Whren*, 517 U.S. at 813.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 808.

<sup>129</sup> *Id.* at 814.

<sup>130</sup> Petitioner argued for the 'would have test', which asks whether an independent, reasonable officer would have stopped the car. *Id.* at 813–15.

<sup>131</sup> A hunch has never been enough to meet either the probable cause standard or the lower standard of reasonable suspicion. Concerning the latter, police are forbidden from acting solely on the basis of an "inchoate and unparticularized suspicion or a 'hunch.'" *Terry v. Ohio*, 392 U.S. 1, 27 (1968).



This hunch may be based on true observable clues, or it may be based on something as impermissible as race.<sup>132</sup>

The decision in *Whren* is quite controversial<sup>133</sup> since it creates a critical gateway into further investigation.<sup>134</sup> This loophole of pre-textual stops is closed by the Supreme Court's holding that police may arrest an individual for a minor traffic violation and then use the *arrest* as a pretext to search the entire vehicle. When an arrest is made at or near a vehicle, the officer is *entitled* to search the entire passenger compartment of the vehicle.<sup>135</sup> This *per se* right to search the vehicle after a custodial arrest gives officers a "compelling . . . incentive to execute custodial arrests for minor offenses so that they can uncover evidence for 'good busts.'"<sup>136</sup> There are two cases, taken together, that create this significant Fourth Amendment gap: *Atwater v. City of Lago Vista* and *New York v. Belton*.

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<sup>132</sup> Harris, *supra* note 18, at 318–19.

<sup>133</sup> Despite its unanimous holding, the decision itself is quite far reaching and controversial in that respect. See JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE, VOLUME 1: INVESTIGATION 126 (4th ed. 2006).

<sup>134</sup> When a police officer starts with a hunch about a suspicious vehicle and then stops the car for a traffic violation such as a seatbelt violation, the officer has an opportunity to ask permission to search the car. Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 158. (2002). For various reasons, people experience a strong need to consent to police authority, so the likelihood that someone will consent to a search is very high. Professor Nadler applies this research in the context of refusing to give consent for a bus sweep search; however, the same research is also relevant in analyzing the anxiety people feel when pressured to give consent to a vehicle search. *Id.* See *infra* Part IV.C for application of Professor Nadler's arguments of consent toward the seizure of people under the Fourth Amendment.

<sup>135</sup> *New York v. Belton*, 453 U.S. 454, 460 (1981). The holding in *Belton* is limited to circumstances where the police intercepted the suspect in his vehicle and then arrested him. However, the Supreme Court even went further to hold that if a *recent occupant* of a vehicle is arrested, police can still conduct a search incident to lawful arrest—even if initial contact with the suspect was made only after the suspect left his vehicle. *Thornton v. United States*, 541 U.S. 615, 617 (2004).

<sup>136</sup> Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 442 (2002).

## 2. Custodial Arrest Carte Blanche<sup>137</sup>

In March of 1997, Gail Atwater was pulled over with her two small children in the backseat for violating a misdemeanor traffic law: failing to wear a safety belt.<sup>138</sup> Although state law in Texas authorizes warrantless arrests for these violations, police are allowed to issue a citation in lieu of arrest.<sup>139</sup> Despite this, Lago Vista police officer Bart Turek decided to place Ms. Atwater under arrest.<sup>140</sup> Ms. Atwater was put in a patrol vehicle, taken to the police station, and asked to remove her accessories and empty her pockets. After her mug shot was taken, Ms. Atwater was placed in jail for an hour, thus equating to a custodial arrest.<sup>141</sup> She then sued the city and the chief of police on grounds that her Fourth Amendment right to be free from unreasonable seizures had been violated, ultimately arguing that custodial

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<sup>137</sup> As a result of *Atwater*, some professors went so far as to hint that the Supreme Court gave the police "constitutional carte blanche," or an unrestricted authority to use their own discretion. Logan, *supra* note 136, at 422. The phrase was also used in relation to the *Atwater* case by Justice O'Connor in her dissent. *Atwater*, 532 U.S. at 365-66 ("Giving police officers constitutional carte blanche to effect an arrest whenever there is probable cause to believe a fine-only misdemeanor has been committed is irreconcilable with the Fourth Amendment's command that seizures be reasonable.") (O'Connor, J., dissenting).

<sup>138</sup> *Atwater*, 532 U.S. at 323-24.

<sup>139</sup> *Id.* at 323. Officer Turek asked to see Ms. Atwater's identification, but when she said that she did not have her papers because her purse had been stolen the day before, Officer Turek said that he had "heard that story two-hundred times." *Id.* at 324. By this point, the children were "frightened, upset, and crying," and the officer refused to allow Ms. Atwater to take her children to a neighbor's house during the arrest. *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* The significance of 'custodial arrest' will become apparent in the context of *Belton*, which only allows a car search if a valid custodial arrest has already been made. *Belton*, 453 U.S. at 460; see also *United States v. Robinson*, 414 U.S. 218, 224 (1973) (warrantless, simultaneous search incident to lawful arrest of the arrestee is reasonable under the Fourth Amendment without any other additional justification). The incentives to effect a full custodial arrest for minor violations grew exponentially after the Supreme Court ruled that a full search of a vehicle, after issuing only a traffic citation, was unconstitutional. *Knowles v. Iowa*, 525 U.S. 113, 117 (1998). In *Knowles*, an Iowa police officer pulled over the defendant for speeding, and even though this was an arrestable offense under Iowa law, the officer instead decided to issue only a citation. *Id.* at 114. By executing what the officer thought was a valid "search incident to [a] lawful citation" (because there was no custodial arrest), the officer found marijuana. *Id.* at 115-16. However, the Supreme Court held that no such exception existed and that the bright line rule from *Belton* applied only when full custodial arrests were actually effected. *Id.* at 118-19. Due to this result, police now have a strong incentive to take people into custody for even minor traffic violations, if only to trigger the *Belton* bright line rule. See *Belton*, 453 U.S. at 460.

arrests should not be allowed for such minor offenses.<sup>142</sup> As a practical matter, her argument would allow police officers to make custodial arrests for only “jailable” offenses, or when the government has shown a “compelling need for immediate detention.”<sup>143</sup>

The Court rejected Ms. Atwater’s distinction for custodial arrests; instead it opted to create a bright line rule: the Fourth Amendment allows an officer to make a full custodial arrest for even minor violations.<sup>144</sup> Justice Souter, writing for a 5-4 majority, argued that it was simply too difficult for police officers to make the distinction between “jailable” and “fine only” offenses at the time of the arrest.<sup>145</sup> The Court proudly unveiled an unambiguous constitutional rule, but in exchange for clarity, the majority turned a blind eye toward the ways in which its newly created standard could lead to abuse.<sup>146</sup> Even more alarmingly, the Court embraced its bright line rule despite recognizing that it would lead to the *wrong* result when applied to Ms. Atwater’s case.<sup>147</sup> The majority noted that Officer Turek’s actions were at best a representation of extremely poor judgment; indeed, the Court concluded that Ms. Atwater’s right to be free from needless indignity “clearly outweigh[ed]” Lago Vista’s interest in effecting an arrest.<sup>148</sup> Nevertheless, the Court brazenly tossed aside a case-by-case analysis and eagerly embraced a bright line rule—admittedly producing an incorrect verdict.

Aside from being counterintuitive, openly adopting a standard that inadequately decides the case at hand only hurts the public’s trust in the law.<sup>149</sup> This is exactly the kind of decision-making and illogicality that

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<sup>142</sup> *Atwater*, 532 U.S. at 325. Specifically, Atwater argued that because a police officer’s authority to effect a warrantless arrest was restricted under traditional common law, then custodial arrests for such minor offenses should be restricted now as well. *Id.* at 326–27. The Supreme Court rejected this line of reasoning but noted that her argument was “by no means insubstantial.” *Id.* at 327.

<sup>143</sup> *Id.* at 346, 348.

<sup>144</sup> *Id.* at 349–50.

<sup>145</sup> *Id.* at 348–49. Instead of having to decide whether the arrest would be “necessary for enforcement of the traffic laws or [whether an] offense would otherwise continue and pose a danger to others on the road,” police officers now just have to decide if a traffic violation has occurred. *Id.* at 349 (quoting Petitioner-Atwater’s Brief).

<sup>146</sup> Logan, *supra* note 136, at 438–39.

<sup>147</sup> *Atwater*, 532 U.S. at 346.

<sup>148</sup> *Id.* at 347.

<sup>149</sup> See TRUST IN THE LAW, *supra* note 17, at 52–57; see also Leslie A. Lunney, *The (Inevitably Arbitrary) Placement of Bright Lines: Belton and its Progeny*, 79 TUL. L. REV. 365, 390 (2004). Professor Lunney contends that bright line rules are inevitably arbitrary since lines must be drawn, yet it nevertheless does not justify drawing a line that is both arbitrary and ostensibly wrong. *Id.*

fosters distrust in both the law, and by extension, in the police.<sup>150</sup> In her dissent, Justice O'Connor expressed her opposition to the majority's bright line rule while squarely pointing out the logical loopholes that would result.<sup>151</sup> She reasoned that because there are so many minor traffic violations at a policeman's disposal,<sup>152</sup> he now has "unfettered discretion" to use one of those traffic provisions as a gateway to further search and seize a driver—by arresting the occupants, searching the vehicle, or impounding the car and inventorying all of its contents<sup>153</sup>—without giving a single reason why such action is reasonable.<sup>154</sup> In building upon the gaps observed by Justice O'Connor, Professor Logan argues: "Of equal if not greater concern, such unbounded discretion threatens that police will enforce the law discriminatorily, a concern expressly downplayed by the *Atwater* majority, yet persistently evidenced on America's streets with socially toxic effects."<sup>155</sup>

By combining the holdings from *Whren* and *Atwater*, a police officer may follow a suspicious car until the driver makes some sort of traffic violation. As the petitioner-defendant from *Whren* noted, "the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation."<sup>156</sup> This is the gap that the Supreme Court leaves open: police officers are given the freedom to investigate their hunches by following cars and stopping them when they "violate" minor traffic laws. Since anything from not wearing a seatbelt to not stopping long enough at a stop sign can be cited, police now have a whole litany of possible reasons to stop a car—even if the true reasons they were suspicious of cars in the first place were for improper reasons.<sup>157</sup>

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<sup>150</sup> Lunney, *supra* note 149, at 390.

<sup>151</sup> *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting).

<sup>152</sup> See Harris, *supra* note 18, at 311–12. Professor Harris writes that although police technically need some sort of reason to stop a car, they virtually always have it via the myriad of minor traffic violations, even though they might not witness more egregious criminal activity. *Id.* This makes it very easy under current law to stop a vehicle to search it and question the occupants with no more evidence than a hunch. *Id.*

<sup>153</sup> *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting) (citing *Colorado v. Bertine*, 479 U.S. 367, 374 (1987)); see also *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976) (police may conduct warrantless searches of impounded vehicles in order to inventory contents found inside).

<sup>154</sup> *Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting).

<sup>155</sup> Logan, *supra* note 136, at 439.

<sup>156</sup> *Whren*, 517 U.S. at 810.

<sup>157</sup> See, e.g., Harris, *supra* note 18, at 271 (recounting anecdote of an African American woman who believes she was arrested and placed in the back of a police car solely on account of her race.).

An improper reason can range from racial discrimination to just an arbitrary, unsupported hunch or feeling. Nonetheless, whatever inappropriate basis for targeting a certain vehicle is relied upon, “police know that they can use the traffic code to their advantage, and they utilize it to stop vehicles for many nontraffic enforcement purposes.”<sup>158</sup> Therefore, current Fourth Amendment jurisprudence has transgressed its purpose as a restriction on police power, and transformed instead into a medium of police strategy.<sup>159</sup>

### 3. *Your Passenger Compartment Becomes Your Grabbing Area*

In efforts to provide a more straightforward rule with regard to the Fourth Amendment, the Supreme Court concluded that a driver’s entire passenger compartment can be searched incident to a lawful arrest—without a warrant, without probable cause, and even without an exigency.<sup>160</sup> This holding came in response to a vehicle stop effected by Trooper Douglas Nicot on the New York Thruway in 1978.<sup>161</sup> Once the car was stopped, Trooper Nicot asked the driver for his license and registration. However, the car was not owned or traceable to any of the vehicle’s four occupants.<sup>162</sup> After smelling marijuana in the car,<sup>163</sup> the officer ordered each of the four individuals out of the vehicle, placed them all under arrest, put them in handcuffs, and separated them so that none of them could touch any other.<sup>164</sup> After removing all of the occupants, the officer found cocaine in a jacket that

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<sup>158</sup> *Id.* at 311–12.

<sup>159</sup> See, e.g., *United States v. Roberson*, 6 F.3d 1088, 1089 (5th Cir. 1993). In *Roberson*, the United States Court of Appeals for the Fifth Circuit upheld the seizure of drugs found during a search of a vehicle that had mismatched plates. *Id.* at 1092. The defendant claimed that the stop was a mere pretext, but the search was upheld regardless, despite strong evidence that the traffic stop was being used as an investigatory tool. *Id.* In fact, during the five years prior to *Roberson*, the same officer “had arrested 250 people on drug charges, *all after traffic stops*.” *Id.* at 1092 (emphasis added). The court even bluntly admitted that it had “become familiar with Trooper Washington’s propensity for patrolling the Fourth Amendment’s outer frontier.” *Id.* The Fifth Circuit disapproved of the officer’s propensity to “use technical violations as a cover for exploring for more serious violations,” but could not hold the search unconstitutional because there had been a legitimate basis for stopping the vehicle (the mismatched license plates). *Id.*

<sup>160</sup> *Belton*, 453 U.S. at 460.

<sup>161</sup> *Id.* at 455.

<sup>162</sup> *Id.*

<sup>163</sup> The officer also spotted a container labeled, “Supergold,” which he associated with the drug. *Id.* at 455–6.

<sup>164</sup> *Id.* at 456.

was inside the passenger compartment.<sup>165</sup> The owner of the jacket, Roger Belton, was indicted for criminal possession, and his motion to suppress the drug was denied.<sup>166</sup>

The Supreme Court's holding in *Belton* was a sharp divergence from previous case law.<sup>167</sup> In 1969, the Court reasoned that the area to be searched incident to a lawful arrest is strictly limited to the immediate control of the arrestee.<sup>168</sup> The justification for this rule stemmed mostly from concerns over the safety of the arresting officer and the preservation of evidence.<sup>169</sup> A search of the 'grabbing area' was reasonable to remove weapons that the arrestee might use in offense against the officer, and to prevent the arrestee from concealing or destroying evidence.<sup>170</sup> The logic of this justification rests in the assumption that arrests are generally volatile occurrences, with much of the upper hand in the favor of the arrestee.<sup>171</sup> Often these warrantless arrests are made in unfamiliar settings to the officer, and therefore the Court is much more amenable toward giving policemen reasonable lenience within the Fourth Amendment in order to protect their safety.<sup>172</sup> In general, the Court is afraid that that the arrestee will gain access to a hidden weapon or reach concealed evidence and destroy it.<sup>173</sup> The key to this logic is that the arrestee must in some way be able to access an item. In fact, the Court in *Chimel* held that this search warrant exception does not apply to areas that are outside of the arrestee's immediate grabbing area.<sup>174</sup> The majority

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<sup>165</sup> *Id.* Although the jacket was inside the vehicle, the officer had to unzip the jacket pocket in order to find the drug. He also opened a closed envelope and found marijuana inside. *Id.*

<sup>166</sup> *Belton*, 453 U.S. at 456.

<sup>167</sup> See Lunney, *supra* note 149, at 381. Professor Lunney notes that while *Belton* did resolve the issue of whether a warrant was needed for this type of search, "the underlying tensions between *Chimel*'s articulated purposes and the scope of searches incident to arrest remained." *Id.* This tension exists despite the *Belton* Court's attempt to preserve *Chimel*. *Id.* at 460 n. 3.

<sup>168</sup> *Chimel v. California*, 395 U.S. 752, 763 (1969).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*; see *infra* note 260 (listing search warrant exceptions created to protect the safety of police officers).

<sup>172</sup> *Chimel*, 395 U.S. at 763

<sup>173</sup> *Id.* The Court wrote, "[a] gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested." *Id.*

<sup>174</sup> *Id.* at 754, 763. Specifically, the Court held that a whole house (room by room) search was unconstitutional since there was no way that the arrestee could have reached those areas. Therefore, the search exceeded the scope of the "immediate grabbing area." *Id.* at 763.

opinion in *Chimel v. California*, written by Justice Stewart, makes complete sense: to allow an arresting officer to search the limited and immediate grabbing area is to preclude the arrestee from gaining access to weapons or evidence.<sup>175</sup>

Despite this ostensibly clear rule, the law had trouble setting the exact boundaries of the “grabbing area.” Defining the scope becomes more difficult when the arrest takes place in a vehicle on a roadway, as in *Belton*.<sup>176</sup> The Court took certiorari to resolve the circuit split,<sup>177</sup> and surprisingly, the majority nearly defied the logical justification established in *Chimel*. Justice Stewart once again wrote the majority opinion, but this time he held that when an arrest is effected in a vehicle, the officer is constitutionally allowed to search the entire passenger compartment of the vehicle.<sup>178</sup> The Court just assumed that this compartment of the car is always within the grabbing area of an arrestee.

However, the holding of *Belton* suffers from conspicuous logical flaws, the first of which is that the four arrested individuals in the vehicle search were no where near the vehicle. In fact, not only were they handcuffed, but they were sequestered and separated from each other and the car.<sup>179</sup> There was no possibility that the passenger compartment of the vehicle from which they were removed was within their literal grabbing area.<sup>180</sup> The justification laid out in *Chimel* simply does not apply to a search of a vehicle when the arrestee is removed from it and physically restrained by locked handcuffs. A weapon left in the vehicle, however secret it may be, probably cannot be used offensively by a driver who is standing outside of the automobile. If the officer is only justified in looking for weapons that will be used against him, it makes more sense to search the driver’s body, not the car from which he was just taken.

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<sup>175</sup> *Id.* at 763.

<sup>176</sup> *Belton*, 453 U.S. at 455.

<sup>177</sup> *Id.* at 459.

<sup>178</sup> *Id.* at 460.

<sup>179</sup> *Id.* at 456.

<sup>180</sup> Myron Moskowitz, *A Rule in Search of A Person: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657, 692 (2002). This is not even the result of post-hoc reasoning, since Professor Moskowitz notes that various police manuals, in addition to common sense, require—if not mandate—that the arrestee must be handcuffed *and* removed from the car before it is searched. *Id.* at 665 (emphasis added). The professor contacted various police departments who were very protective of their police manuals, presumably so criminals do not counteract them. *Id.* However, the police departments that did respond all had manuals that ordered the officer to handcuff and then get the arrestee away from the scene as soon as possible. *Id.* In the police manuals that Professor Moskowitz cited, all commanded that the arrestee be handcuffed and secured before any searching begins. *Id.*

The second major flaw of the decision is that the Court defined a “passenger area” far too broadly given the policy justifications for a search incident to a lawful arrest.<sup>181</sup> If the reasons from *Chimel* were carried over to vehicles, then only the area where a suspect could immediately gain access to a hidden weapon or evidence could be subject to this type of warrantless search.<sup>182</sup> Despite characterizing the passenger compartment as “relatively narrow,” the Court ironically extended the scope *beyond* the immediate grabbing area of the driver (the area around the driver’s seat and the console, etc.) and into the passenger area, the backseat, and any containers—opened or closed—including the glove compartment.<sup>183</sup> The Court in *Belton* made this explicitly clear when it stated:

Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.<sup>184</sup>

Normally, a closed container inside a vehicle can only be searched (absent custodial arrest) if there is probable cause that the container contains contraband and is inside of the vehicle.<sup>185</sup> However, the over-extension of the

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<sup>181</sup> Lunney, *supra* note 149, at 383 (noting that when courts extended *Belton*’s bright line rule there was only a ‘tenuous connection’, at best, to the twin *Chimel* purposes). Skeptical of *Belton*’s ties to *Chimel*, Justice O’Connor also characterized the justification for such a broad bright line rule as a “shaky foundation.” *United States v. Thornton*, 541 U.S. 615, 624 (2004) (O’Connor, J., concurring in part). A five Justice majority in *Thornton* ruled that *Belton*’s bright line rule applied even to arrestees who have left their vehicles, but were “recent occupants” of it. *Id.* at 623–24; *see also supra* note 135. Based only upon a “shaky foundation,” the *Belton* rule becomes divorced from its original justification in *Chimel*. Without a strong connection between the bright line rule and its rationale, future courts are at a major disadvantage in applying the rule in new circumstances—since the justification itself has been rendered null. Lunney, *supra* note 149, at 392. Therefore, the Court is forced to define the rule’s parameters using the language of the rule itself instead of determining whether the extension legitimately furthers the original policy goals in *Chimel* (police safety and preservation of evidence). *Id.* The way the Court has cornered itself is evident in the Court’s holding in *Thornton*: the majority held onto its bright line rule despite admitting that it was unlikely a suspect could have even reached a weapon or evidence under the driver’s seat when he was outside of the car. *Id.* at 622. Professor Lunney characterized the *Thornton* decision as inevitable, since without the *Chimel* goals to rest its reasoning on, the “Court had no choice but to extend its analytical fiction . . .” Lunney, *supra* note 149, at 392.

<sup>182</sup> Lunney, *supra* note 149, at 367.

<sup>183</sup> *Id.* at 366; *Belton*, 453 U.S. at 460.

<sup>184</sup> *Belton*, 453 U.S. at 461.

<sup>185</sup> *California v. Acevedo*, 500 U.S. 565, 574 (1991). The warrantless search of a container within a vehicle has its own tumultuous history within the Supreme Court. *See*



*Chimel* doctrine allows police to bypass this probable cause requirement when they make a custodial arrest. Therefore, in a search incident to a lawful arrest near a vehicle, police do not have to assess whether they have probable cause to search a container that is coincidentally inside the automobile. Instead, much to Justice O'Connor's dismay, it is now an entitlement.<sup>186</sup>

Once again, the Court's preference for a bright line rule falters due to its over-inclusiveness. The law guiding police officers is now clear: make a valid arrest of a driver, and one is fully entitled to search the passenger compartment of the car. But the illogic of this ruling allows for an astonishing exploitation of the Fourth Amendment—the police can dispose of the warrant requirement even when no exigency exists.<sup>187</sup>

#### 4. Putting it all Together: A Hypothetical

Through the line of cases stemming from *Knowles*, *Whren*, *Atwater*, and *Belton*, the lenience toward deception under the current Fourth Amendment jurisprudence is unmistakable. The gap of deception that the Supreme Court has allowed through this line of cases is perhaps best elucidated by a hypothetical.

A policeman gets a tip that a green pickup truck may be involved with drug possession.<sup>188</sup> The officer drives to the intersection where the drug

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Arkansas v. Sanders, 442 U.S. 753 (1979), overruled by *Acevedo*, 500 U.S. at 579. As the law currently stands, probable cause is needed to open and search a closed container placed inside of a vehicle—assuming that there has not been a custodial arrest. See *Acevedo*, 500 U.S. at 579.

<sup>186</sup> *Thornton*, 541 U.S. at 624 (O'Connor, J., concurrence in part). Justice O'Connor noted that the extension of *Belton*'s bright line rule to individuals who have just left their vehicles is suspect and that "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*." *Id.* The Supreme Court later acknowledged that Justice O'Connor's reservations about the *Belton* rule have turned into reality: "[*Belton*] has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Arizona v. Gant*, No. 07-542 (U.S. Apr. 21, 2009).

<sup>187</sup> Moskowitz, *supra* note 180, at 674.

<sup>188</sup> This one tip alone, not being incredibly detailed or specific, would fail meeting the probable cause threshold. Under the totality of circumstances, it is unclear how reliable or accurate this statement is—moreover, the police do not know how reliable this tipster is, nor how the tipster became privy to this information. *Illinois v. Gates*, 462 U.S. 213, 231 (1983). It is also mostly a descriptive rather than a prescriptive tip; therefore it would probably fail the reasonable suspicion threshold as well. *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (for a tip to meet reasonable suspicion it must be more than just an accurate description; the tip must provide predictive information that police can corroborate).

transaction is supposedly taking place and sees a vehicle matching the tip. The occupant inside is not displaying any overt illegal actions, yet the officer remains suspicious. He watches the vehicle stop at a stop sign, but the driver fails to signal his intention for a turn. The officer decides to follow this car, then flashes his lights and pulls the car over. When he approaches the driver, the policeman mentions that the reason why he stopped the car was for the failure to signal. Yet, curiously, the officer asks to search the vehicle, and the driver, feeling nervous and scared, agrees. During this initial search, nothing is found. The officer decides now to call in a K-9 unit even though there is nothing to support the suspicion of drug use other than the initial tip. The stop has now taken over an hour, and when the K-9 finally comes, no evidence of narcotics is found. The policeman, having called backup, places the driver under arrest for the traffic violation,<sup>189</sup> although admittedly, the officer's real reason for the arrest related to possible drug possession.<sup>190</sup> The officer searches the driver's person, his clothes, and the entire passenger compartment,<sup>191</sup> where the officer finds 200 grams of methamphetamine.

What is most notable about this scenario is that it all started with a tip that did not by itself amount to reasonable suspicion or probable cause. Yet from this initial "hunch" the officer was able to stay within the Fourth Amendment confines and legally maneuver through the gaps in the law to finally make a successful search. But note the anomaly of this situation: if the officer only stopped the vehicle for the failure to signal, there is really no need to search the vehicle or even ask to search it once the traffic citation is issued.<sup>192</sup> Asking consent to search may not even be based on a reasonable

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<sup>189</sup> This full custodial arrest is justified under *Atwater*. 532 U.S. at 346. Hypothetically, this police officer knows he wants to search the vehicle, so to do so legally, he has a strong incentive to arrest. *Knowles*, 525 U.S. at 114.

<sup>190</sup> The pre-textual stop is expressly allowed under *Whren*. 517 U.S. at 816–17. The officer's subjective intentions for an arrest are irrelevant as long as there is an objective basis for the arrest—in this case, the traffic violation.

<sup>191</sup> By applying *Belton*, the search of the entire passenger compartment is justified even without a warrant, probable cause, or reasonable suspicion. *Belton*, 453 U.S. at 460. The search of the arrestee's person is constitutional due to *United States v. Robinson*. 414 U.S. 218, 224 (1973).

<sup>192</sup> Professor Maclin noted that police often ask motorists whom they have pulled over a litany of questions that have nothing to do with the ostensible purpose of the stop. Tracey Maclin, *Police Interrogation During Traffic Stops: More Questions Than Answers*, 31 CHAMPION 34 (2007) [Hereinafter Maclin, *Traffic Stops*]. In one instance, a policeman stopped a vehicle for speeding and then proceeded to ask the driver over fifty questions during the stop, including whether there were drugs and weapons inside the car—despite the fact that the driver did not exhibit any suspicious conduct. *Maxwell v. State*, 785 So.2d 1277, 1279 (Fl. Dist. Ct. App. 2001). Professor Maclin argues that if the driver in these types of scenarios denies possession of illegal items, it triggers the

belief that contraband will be found inside the vehicle.<sup>193</sup> Instead, as Professor Maclin argues, this absurdity of running through a barrage of scripted questions is meant to exploit the vulnerability of an automobile driver who has been caught in a police seizure.<sup>194</sup> Through these gaps left open in the Fourth Amendment, the scrutiny of such behavior slips through the cracks, and the illogicality of needing to search remains unquestioned. The problem with each of these holdings (*Knowles*, *Whren*, *Atwater*, and *Belton*) is that individually, they are mostly benign, yet this line of cases can be strewn together to circumvent the Fourth Amendment. Although this scenario was posed as a hypothetical, it is in fact a real case involving real individuals.<sup>195</sup> This case demonstrates that the loopholes within the Fourth Amendment are being taken advantage of by the police.<sup>196</sup> As guided by the Supreme Court, the court held that the evidence was lawfully obtained and denied its suppression.<sup>197</sup>

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policeman to ask consent to search, even though this bears little relevance to the traffic stop. Maclin, *Traffic Stops*, *supra*, at 34.

<sup>193</sup> Maclin, *Traffic Stops*, *supra* note 192, at 34.

<sup>194</sup> *Id.*

<sup>195</sup> *State v. Gray*, 158 S.W.3d 465 (Tex. Ct. App. 2005) (en banc). Although the hypothetical version remains materially the same, some of the facts have been slightly changed.

<sup>196</sup> This validity of exploiting these loopholes was recently challenged in the Supreme Court of the United States. See *Arizona v. Gant*, 162 P.3d 640 (Ariz. 2007), *cert. granted*, 76 U.S.L.W. 3226 (U.S. Feb. 25, 2008 (No. 07-542)) [Hereinafter *Gant II*]. In the lower court decision, the Arizona State Supreme Court ruled that a warrantless search of the defendant's vehicle, while the defendant was handcuffed and sitting inside a locked patrol car, was not justified under the Fourth Amendment. *Arizona v. Gant*, 162 P.3d 640, 643 (Ariz. 2007) [Hereinafter *Gant I*]. The court could not see how the safety justifications in *Chimel* applied to a sequestered individual and held that when an arrestee "is secured and thus presents no reasonable risk to officer safety or the preservation of evidence, a search warrant must be obtained." *Gant I*, 162 P.3d at 646. In its Petition for Writ of Certiorari, the State argued that *Belton* did not require a retrospective, case-by-case analysis to determine whether an actual risk to the police officer existed; thus the Arizona court effectively "overruled" the Supreme Court. Brief of Petitioner at 10, *Arizona v. Gant*, 2007 WL 3129919 (No. 07-542). Stressing the twin justifications under *Chimel*, the Defendant-Respondent countered that a warrantless search is not always permitted, even under the *Belton-Thornton* line of cases. Brief of Respondent, *Arizona v. Gant* WL 244978 (No. 07-542). The Supreme Court granted certiorari on the question of whether the Fourth Amendment requires police officers "to demonstrate a threat to their safety or a need to preserve evidence . . . in order to justify a warrantless vehicular search incident to arrest conducted after the . . . occupants have been . . . secured." *Gant II*, at \*1. For details on the Court's opinion, see *infra* notes 268–69.

<sup>197</sup> *State v. Gray*, 158 S.W.3d 465, 470 (Tex. Ct. App. 2005) (en banc). This was an en banc opinion reviewing whether the Texas Court of Appeals trespassed on the trial court's discretion in fact finding. *Id.*

### C. *The Seizure of People*

The other realm within the Fourth Amendment that is being plagued by deception is the law governing the seizure of people.<sup>198</sup> Generally, people have the liberty to move about as they please, free from police interference.<sup>199</sup> The standard for when exactly someone has been seized under the Fourth Amendment<sup>200</sup> has been set by two main cases: *Terry v. Ohio*<sup>201</sup> and *United States v. Mendenhall*.<sup>202</sup> The deception present in the *Terry-Mendenhall* doctrine is the result of two missteps: first, the Supreme Court failed to create a standard for seizures that is fairly applied in the real world,<sup>203</sup> and second, the Court has become complacent toward jurisprudence that allows African Americans to have their freedom of movement curtailed in stop and frisks far more than their white counterparts.<sup>204</sup>

#### 1. *When a Reasonable Person Would Feel Free to Leave—Really?*

In 1968, the Supreme Court provided its first glimpse of how it would determine whether a seizure of a person has occurred.<sup>205</sup> In *Terry*, the Court stated: "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we

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<sup>198</sup> There is some slight overlap between the law of vehicular searches and the seizure of people inside a stopped car; however, they are in fact two separate analyses that fall under two different bodies of case law. Whereas the previous section concerned warrantless vehicle searches, the present section discusses whether a seizure of an individual (either on foot or in vehicle) is unreasonable under the Fourth Amendment.

<sup>199</sup> Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1259 (1990) [Hereinafter Maclin, *Locomotion*]. Professor Maclin calls this right the freedom of locomotion.

<sup>200</sup> "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

<sup>201</sup> 392 U.S. 1 (1968).

<sup>202</sup> 446 U.S. 544 (1980).

<sup>203</sup> Maclin, *Locomotion*, *supra* note 199, at 1300–01.

<sup>204</sup> David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 4–5 (1994) [hereinafter Harris, *Frisking Every Suspect*]; see also James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES, Mar. 20, 1994, § 6 (Magazine), at 46 (arguing that stop and frisks should be increased to confiscate guns, even if it means that young black and Hispanic men will be targeted more often).

<sup>205</sup> *Terry*, 391 U.S. at 16–19. In *Terry*, a police officer noticed three suspicious individuals 'casing' a warehouse. *Id.* at 6. The officer approached the individuals, spun them around, and frisked them. *Id.* at 7. The officer found a concealed weapon in one of the suspect's inside pockets. *Id.*

conclude that a 'seizure' has occurred."<sup>206</sup> However, this would not remain the black letter law for long. It was eventually replaced by a peculiar plurality opinion carried only by two votes in *United States v. Mendenhall*, which, through later cases, was adopted as law.<sup>207</sup> The standard given by Justices Stewart and Rehnquist transformed the *Terry* test into a totality of circumstances analysis, asking whether an objectively reasonable person would have believed that he or she was free to leave.<sup>208</sup>

On February 10, 1976, Ms. Mendenhall arrived at the Detroit airport, where she was approached by two federal agents.<sup>209</sup> The agents noticed that her behavior seemed suspicious, it being similar to what they would expect of someone who was smuggling narcotics.<sup>210</sup> They asked to see her ticket and noticed that it had a different name than her identification, after which they took her to a back room for questioning.<sup>211</sup> The agents searched Ms. Mendenhall and her bag, where they found heroin.<sup>212</sup> Applying the objective standard, the Court looked to the totality of the circumstances<sup>213</sup> and concluded that Ms. Mendenhall—a reasonable person—had no "objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way."<sup>214</sup>

The standard elucidated in *Mendenhall* begs two questions: when exactly does a reasonable person feel free to walk away from a police officer; and

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<sup>206</sup> *Id.* at 19 n.16. The *Terry* opinion is best known for two points: first, it established a seizure of a person as more of a sliding scale; second, it did so by allowing officers to "stop and frisk" an individual for concealed weapons under less than probable cause. *Id.* at 30–31. This 'less intrusive' version of a seizure does need to be supported by reasonable suspicion. *Id.* at 22.

<sup>207</sup> 446 U.S. 544 (1980). Justice Stewart and Justice Rehnquist announced the judgment of the Court, which reversed and remanded the case. *Id.* at 546. Justice Powell, Justice Blackmun and Chief Justice Burger concurred in parts I, IIB, IIC and III and concurred in the judgment. *Id.* at 560. Justices White, Brennan, Marshall, and Stevens dissented. *Id.* at 566 (White, Brennan, Marshall, and Stevens, J.J., dissenting).

<sup>208</sup> *Id.* at 545.

<sup>209</sup> *Id.* at 547.

<sup>210</sup> *Id.* Namely, the agents believed that she fit a 'drug courier profile': (1) she arrived from Los Angeles; (2) she was the last person to deplane; (3) she did not claim any baggage; and (4) she changed airlines for her flight out of Detroit. *Id.* at 547 n.1.

<sup>211</sup> *Id.* at 548.

<sup>212</sup> *Id.* at 549.

<sup>213</sup> *Mendenhall*, 446 U.S. at 554–55. In support of his holding, Justice Stewart noted that the event took place on a public concourse, the agents identified themselves, and they had no weapons. *Id.* at 555.

<sup>214</sup> *Id.* Compare with *Florida v. Royer*, 460 U.S. 491, 501 (1983) (plurality) (when agents withheld ticket, passenger was effectively seized under the Fourth Amendment since he objectively was not free to leave).

whether the “reasonable person” is truly representative of the people who are the most stopped? The inadequate way that the Supreme Court dealt with these questions has fostered deception within the Fourth Amendment. The *Mendenhall* opinion eventually produced the following understanding of when a seizure takes place: “[A]s long as the person to whom [police] questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would require some particularized and objective justification.”<sup>215</sup> The significant problem with this holding is that a vast majority of people simply do not feel free to leave the presence of a police officer in the middle of a conversation.<sup>216</sup> As most people would not feel free to just drive away during a traffic stop, most people likewise would not “feel free” to just walk away from a police officer when they are being questioned—even if the right to leave exists. Professor Nadler has written that “our script for interacting with police officers undoubtedly involves ready cooperation and compliance with requests.”<sup>217</sup> The empirical evidence to date indicates that outsiders to the actual exchange between the police and the individual systematically overestimate the ability of that individual to walk away.<sup>218</sup>

The Supreme Court justices are themselves clear examples of such “outsiders”; although their standard may work in chambers, it fails to resemble how the public acts and feels when encountering police on the streets. In its post-*Mendenhall* opinions, the Court has further limited the instances where a seizure under the Fourth Amendment occurs. Police may now board a stopped bus at a station and interview all the occupants one by one in their seats without infringing upon the Constitution, because they assume that the occupants would feel free to get up and depart.<sup>219</sup> The Court did note that the officers did not draw weapons, they did not block the aisle, and they spoke in quiet, polite voices.<sup>220</sup> However, the Court failed to

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<sup>215</sup> *Mendenhall*, 446 U.S. at 545.

<sup>216</sup> Nadler, *supra* note 134, at 197 and accompanying text.

<sup>217</sup> Nadler, *supra* note 134, at 197.

<sup>218</sup> *Id.* at 155–156.

<sup>219</sup> *United States v. Drayton*, 536 U.S. 194, 203–04 (2002). In this case, Mr. Drayton was traveling on a Greyhound bus when it made a scheduled stop along the route. *Id.* at 197. Two plain clothes officers boarded the bus and, starting in the rear, worked their way forward by asking the passengers questions and requesting to match them to their luggage. *Id.* at 199. One of the officers asked Mr. Drayton to check his luggage and then asked to search his person—both of which Mr. Drayton consented to. *Id.* Mr. Drayton and another passenger filed a motion to suppress the contraband that was found, on grounds that it was found only after an illegal seizure of his person. *Id.* Along with ruling that Mr. Drayton was not seized, the Court ruled this consent was, in fact, valid. *Id.* at 200.

<sup>220</sup> *Id.* at 203–204.

recognize the inherent authority that police officers bring to a conversation and how intimidated an individual might feel in that moment when speaking to the police, regardless of the officer's tone of voice.<sup>221</sup> In deciding that there was no seizure—since a reasonable person would be free to terminate the police encounter—the Court ignored the possibility that bus passengers are extremely unlikely to exercise such a liberty.<sup>222</sup> Therefore, an incongruity remains between the theoretical application of the law and the way it actually operates in real life.

Even more astonishingly, the Supreme Court has held that when police enter a factory carrying firearms and block the exits, there still has been no seizure of any of the individuals inside.<sup>223</sup> In order to catch illegal immigrants, the police would raid factories, randomly question each employee, and request to see their identification.<sup>224</sup> Despite previously setting forth a totality of the circumstances, objective analysis which asked whether a reasonable person would feel free to leave,<sup>225</sup> the Court instead framed the question in *Delgado* as: does mere questioning by an officer amount to a seizure of a person?<sup>226</sup> In holding that factory sweeps do not amount to a seizure of the people inside, the Court laid down the following reasoning. It first noted that although the exits may have been blocked, the workers were still able to move freely *within the factory*.<sup>227</sup> Second, the Court merely waived aside the fact there were agents at the doors, concluding that their

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<sup>221</sup> See Nadler, *supra* note 134, at 168. Additionally, after watching multiple other passengers provide consent to the officers, “a reasonable innocent person in Drayton’s [] shoes would have concluded that consenting [to the searches] was the correct thing to do.” *Id.* at 185.

<sup>222</sup> *Id.* (citing Stanley Milgram, OBEDIENCE TO AUTHORITY 104 (Harper & Row, 1983)). Psychological research demonstrates that the general public complies with authority—and often makes decisions that they would otherwise not make—when under social pressure. *Id.* at 174. Furthermore, interdisciplinary studies covering the social psychology of compliance, conformity, influence, and politeness indicate that “the extent to which people feel free to refuse to comply is extremely limited under situationally induced pressures.” *Id.* at 155.

<sup>223</sup> *I.N.S. v. Delgado*, 466 U.S. 210, 212, 218 (1984). To provide more detail, multiple agents would enter the factory by surprise and then station themselves near the exits while other agents would systematically move through the factory. *Id.* at 212. The agents were armed, but no weapons were drawn. *Id.*

<sup>224</sup> Maclin, *Locomotion*, *supra* note 199, at 1275; see also *Delgado*, 466 U.S. at 212–13. If, during the questioning, the agents received an acceptable answer, they would then move on to the next individual; however, if the response was unsatisfactory, then the employee had to produce his or her papers. *Id.*

<sup>225</sup> See *Mendenhall*, 446 U.S. at 553.

<sup>226</sup> *Delgado*, 466 U.S. at 216.

<sup>227</sup> *Id.* at 218.

purpose was to make sure all the individuals were questioned.<sup>228</sup> Since securing the entire factory was not a seizure, the only question remaining was whether the individual interviews were seizures—which the Court answered in the negative.<sup>229</sup> However, even if the guarding of the doors may have served the purposes mentioned by the majority, the Court failed to concede that it may have given individuals the impression that they were not free to leave the factory. Instead, the only concession offered by Justice Rehnquist was that surprise entry, systematic questioning, and blocked exits indirectly limited the workers' freedom of movement to a small degree.<sup>230</sup> Yet as quickly as the inference was made, it was rendered null: "Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers."<sup>231</sup> This implies that by the mere fact the factory employees showed up for work, they implicitly consented to a limited expectation of locomotion; thus allowing themselves to be seized in practice, but not by law.

In sum, critics of these holdings argue that in order to preserve the police's discretion to stop and question individuals, the Court has been forced to "adopt unrealistic and deceptive standards to resolve the question of when a person has been seized within the meaning of the Fourth Amendment."<sup>232</sup> Professor Maclin has forcefully argued that the *Mendenhall* rule exists in an unrealistic world, because in the real world, "few people are aware of their Fourth Amendment rights, many individuals are fearful of the police, and police officers know how to exploit this fear."<sup>233</sup> Although police encounters are certainly not thought of by the Court as friend-to-friend conversations, the Court still should not be allowed to turn a blind eye toward the incongruence between the seizure of a person under the Fourth Amendment and the seizure of an individual as defined by an ordinary person. This inconsistency is then exacerbated by the increasingly lax Fourth

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<sup>228</sup> *Id.* In a somewhat brash explanation, the Court stated: "[The agent's presence at the doors] should have given respondents no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer." *Id.*

<sup>229</sup> *Id.* at 219.

<sup>230</sup> Maclin, *Locomotion*, *supra* note 199, at 1276.

<sup>231</sup> *Delgado*, 466 U.S. at 218.

<sup>232</sup> Maclin, *Locomotion*, *supra* note 199, at 1284.

<sup>233</sup> *Id.* at 1301. Professor Maclin emphasizes the absurdity of the *Mendenhall* opinion with a rhetorical question: "If a person is unlikely to ignore an officer's approach, and is equally unlikely to know of her right to depart, is the Court really serious in believing that the average person will exercise her right to do so?" *Id.*



Amendment guidelines that regulate when a police officer may stop and frisk an individual.

## 2. *The Automatic (and Arbitrary) Stop and Frisk*

In *Terry v. Ohio*,<sup>234</sup> the Court held that a somewhat less intrusive search for weapons—a frisk<sup>235</sup>—could be made under a reasonable, articulable suspicion that the suspect is actually armed and dangerous.<sup>236</sup> There are two rationales for a *Terry* frisk: first, a reasonable suspicion that the suspect is committing or is about to commit a violent offense; or second, that the suspect is armed.<sup>237</sup> Although the *Terry* rule was constructed to be a very narrow warrant exception, courts have continually extended the constitutionality of the stop and frisk to other situations—both by expanding the types of offenses considered violent and by labeling certain types of people and places as always posing a risk to officer safety.<sup>238</sup> This once-

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<sup>234</sup> For the basic facts in *Terry*, see *supra* note 205. For a more complete summary of the case, including a detailed background of Detective McFadden, see John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 784–793 (1998).

<sup>235</sup> A frisk, as defined by the *Terry* Court, is a cursory search “confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.” *Terry*, 392 U.S. at 29. The Court buried in its opinion a real-life description of a frisk, taken from a police manual: “[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.” *Id.* at 17 n.13 (citing L.L. Priar & T.F. Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L.C. & P.S. 481, 481 (1954)). Another description instructs:

Check the subject's neck and collar. A check should be made under the subject's arm. Next a check should be made of the upper back. The lower back should also be checked. A check should be made of the upper part of the man's chest and the lower region around the stomach. The belt, a favorite concealment spot, should be checked. The inside thigh and crotch area also should be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject.

*Minnesota v. Dickerson*, 508 U.S. 366, 381–82 (1993) (Scalia, J., concurring) (quoting J. MOYNAHAN, *POLICE SEARCHING PROCEDURES* 7 (1963) (citations omitted)).

<sup>236</sup> *Terry*, 392 U.S. at 30. Like many other exceptions, the *Terry* rule was justified to protect police officer safety. *Id.* See *infra* note 260.

<sup>237</sup> *Terry*, 392 U.S. at 30.

<sup>238</sup> *Harris, Frisking Every Suspect*, *supra* note 204, at 5.

focused exception has now grossly surpassed its original scope in *Terry*.<sup>239</sup> Because the courts allow the police to stop and frisk individuals who *could be* dangerous, the law is alarmingly close to authorizing an automatic right to stop and frisk.<sup>240</sup> Despite the growth of the *Terry* exception, the Supreme Court has not intervened, thus passively permitting more rampant use of the automatic stop and frisk. The deception within this area of the law stems from this over-extension of the *Terry* doctrine. When a frisk is upheld for reasons other than the two permitted under *Terry*—for example, when a suspect flees unprovoked in a high crime area<sup>241</sup>—the law creates a loophole by which police can arbitrarily choose who they want to stop and frisk.

In *Illinois v. Wardlow*, two officers were in an area known for heavy narcotics trafficking and spotted Mr. Wardlow standing next to a building holding an opaque bag.<sup>242</sup> Mr. Wardlow turned around and ran away from the uniformed officers, but he was caught as one of the officers chased after him.<sup>243</sup> During a pat-down search of his body, the officer found a firearm and ammunition.<sup>244</sup> The Supreme Court upheld the search, reasoning that while unprovoked fleeing is “not necessarily indicative of wrongdoing, [it certainly is] suggestive of such.”<sup>245</sup> But more importantly, the Court ruled that although unprovoked fleeing could not alone be the basis of reasonable suspicion, as long as it was coupled with other factors, the *Terry*-level search would be justified.<sup>246</sup> One such factor in *Wardlow* relevant for consideration was the location: the officers were in a “high crime area.”<sup>247</sup>

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<sup>239</sup> *Id.* at 5–6. Justice Harlan gave a warning to lower courts to exercise caution when allowing stop and frisks: “If the nature of the suspected offense creates no reasonable apprehension for the officer’s safety, I would not permit him to frisk unless other circumstances did so.” *Sibron v. New York*, 392 U.S. 40, 74 (1968) (Harlan, J., concurring). However, the warning did not prevent lower courts from stretching the twin rationales for *Terry* frisks “out of shape.” Harris, *Frisking Every Suspect*, *supra* note 204, at 22.

<sup>240</sup> Harris, *Frisking Every Suspect*, *supra* note 204, at 22–23.

<sup>241</sup> *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

<sup>242</sup> *Id.* at 121–22.

<sup>243</sup> *Id.* at 122.

<sup>244</sup> *Id.* The Defendant was convicted for unlawful use of a weapon by a felon, but the Illinois Appellate Court reversed the conviction on grounds that sudden flight did not amount to reasonable suspicion necessary to conduct a *Terry* level frisk. *Id.*

<sup>245</sup> *Id.* at 124.

<sup>246</sup> *Id.* (“[O]fficers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation.”). This holding—that unprovoked fleeing in a high crime area amounts to reasonable suspicion—has been heavily criticized. See, e.g., Lenese C. Herbert, *Can’t You See What I’m Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 GEO. J. ON POVERTY L. & POL’Y 135, 143–44 (2002). Indeed, there are

The Court left the exact definition of “high crime area” noticeably vague and instead deferred to the common sense judgments of the police.<sup>248</sup> But when the definition is left ambiguous, police are free to characterize almost every location as a “high crime area.”<sup>249</sup> Not only is over-inclusiveness a pressing concern, but police officers seem to “know” why a particular area is more dangerous, deadly, or lawless without any real standards upon which to base their conclusions. Due to the absence of clear guidelines, it is easier to call a location a “high crime area” when what is really meant is that officers are dealing with “high crime people”—those who are “poor, undereducated, black and brown males who live in or frequent depressed (e.g., culturally, educationally, socially, economically) inner-city neighborhoods.”<sup>250</sup> Thus, a loophole has been created within the law of *Terry*-level frisks: reasonable suspicion can be based on expressive conduct in a high crime area,<sup>251</sup> and because there is no clear guidance on what is a “high crime area,”<sup>252</sup> police can use this as a façade to arbitrarily target certain types of people—especially African Americans.<sup>253</sup>

Contrary to what the Court presumed, this arbitrariness is not usually being used to achieve fairness on the streets. Instead, “[t]hose who police would frisk most often, who would suffer most of the indignities this rule would allow, are not distributed evenly across the population . . . African-Americans and Hispanic-Americans pay a higher personal price for

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numerous reasons why an innocent person would prefer to run away from the police, the least of which is just to avoid undue harassment. *Id.* at 145. Moreover, it makes little sense to imbue more meaning in a person who runs away from police in a “high crime area,” rather than a “low crime area” unless it is believed that “only the guilty flee.” The Court has given a glimpse that it, in fact, supports such a view: in a majority opinion, Justice Scalia quoted Proverbs 28:1 (“The wicked flee when no man pursueth”) to hint that only people who “scatter in panic upon the mere sighting of the police” have something to hide. *California v. Hodari D.*, 499 U.S. 621, 623 n.1 (1991). The dissenters in *Hodari D.* called Justice Scalia’s biblical allusion “gratuitous” and flatly rejected the majority’s claim that “only the guilty flee.” *Id.* at 630.

<sup>247</sup> *Wardlow*, 528 U.S. at 124.

<sup>248</sup> *Id.* at 125 (noting that exact scientific certainty is an unrealistic expectation; reasonable suspicion will be based on common sense determinations and judgments about human behavior).

<sup>249</sup> Herbert, *supra* note 246, at 135.

<sup>250</sup> *Id.* at 136 (citation omitted).

<sup>251</sup> *Wardlow*, 528 U.S. at 124.

<sup>252</sup> Nor do judges ever challenge a policeman’s opinion that a certain location is a “high crime area.” Herbert, *supra* note 246, at 135.

<sup>253</sup> *Id.* at 136. Professor Herbert goes as far to say that “police have the implicit authorization to create and apply an inferior set of rights to individuals in high-crime areas.” *Id.*

contemporary stop and frisk practices than whites do.”<sup>254</sup> This sentiment has been echoed by Professor Maclin who wrote that “[b]lack men are associated with ‘crimes against the person, with bodily harm to police officers, and with a general lack of support for the police’ . . . . For this reason, black males doubly draw the attention of police officers.”<sup>255</sup> Personal anecdotes from African American men reveal that they expect to endure harassment and unfair treatment at the hands of the police in the form of being stopped, searched and interrogated under no valid justification.<sup>256</sup> Whether or not the harassment actually happens, the *perception* that it will or does take place is just as potent encouragement for following the Stop Snitching code. Through the gaps in the law, police have found a way to heavily investigate “suspicious people,” stopping them and frisking them in this vague and enigmatic “high crime area.” Although a “high crime area” cannot be the sole basis for reasonable suspicion, police can cite many other factors, such as fleeing or the time of day, *in conjunction with* the “high crime area,” in order to conduct a *Terry*-level search.<sup>257</sup> Through this façade, police can now target the people whom they wish to stop, a reality which causes a devastating toll on the public’s trust—especially when one is the victim of such an arbitrary seizure. It is due to this mistreatment that many people feel antagonized by law enforcement: “This combination of fear and distrust produce in many blacks a hidden, but seething anger and contempt for the police.”<sup>258</sup>

#### IV. CLOSING THE GAP AND REBUILDING THE TRUST

What is imperative about the Fourth Amendment is that although police officers may be the face of the law, their actions are defined in scope and type by the Supreme Court. The allowance and use of deception is not necessarily the product of police indiscretion, *per se*, but rather the result of the Supreme Court’s opinions. Trust within the law needs to be rebuilt by

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<sup>254</sup> Harris, *Frisking Every Suspect*, *supra* note 204, at 43–44.

<sup>255</sup> Maclin, *Black and Blue*, *supra* note 109, at 259 (internal citations omitted).

<sup>256</sup> Rosenfeld, *supra* note 102, at 295. One of the author’s interviewees related this anecdote: “We was standing on the corner, police pulled up, told us all to get against the wall. We asked them, you know, what did we do, what we gotta get against the wall for? ‘That ain’t none of your motherfucking business! Just turn your ass around and get against the wall.’ [T]hey searched us and handcuffed us and, made us sit out there in the rain for about 25 minutes.” (ellipsis omitted).

<sup>257</sup> See, e.g., *Mitchell v. State*, 955 So. 2d 640, 642 (Fla. Dist. Ct. App. 2007) (frisk of individual in a high crime area late at night who flees from police is justified); *Commw. v. Sykes*, 867 N.E.2d 733, 739 (Mass. 2007) (frisk of individual who moved away from police by bicycle, and then on foot in a high crime area was supported by reasonable suspicion).

<sup>258</sup> Maclin, *Black and Blue*, *supra* note 109, at 258.

fixing these gaps and closing the loopholes in the law that *allow* for such deception.

### A. *Police Are Not the Sole Culprits*

Though the logical fallacies may be palatable in Supreme Court chambers, they have severe consequences when innocent people are, at least perceptually, the victims of such practices on a consistent basis. This Note is by no means asserting that police officers are inherently corrupt or unethical individuals. Indeed, police have a strong and legitimate interest in protecting their safety as they deal with the potentially volatile situations of traffic stops, searches, and arrests.<sup>259</sup> But because police officers function as the primary interface between the Fourth Amendment and the public, it is often the police who are blamed for the application of the law and bear the brunt of the public's resentment.<sup>260</sup> As Professor Maclin observes, "black males learn at an early age that confrontation with the police should be avoided."<sup>261</sup> In Baltimore, "[n]early 80% of officers said the relationship between police and citizens was not very good. Nearly 50% of black officers believed that police stop people based on race, gender, and age rather than probable cause."<sup>262</sup>

Even though the police seem to bear the brunt of the public's resentment, the true catalyst to the Stop Snitching movement is not police conduct alone.

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<sup>259</sup> It is no doubt that traffic stops "can sometimes be fraught with peril for the police officer or state trooper—because they never know when a seemingly routine traffic stop could lead to trouble, or even violence." Kevin Ransom, *Inside the Mind of Cop Who Stopped You*, CNN.COM Feb. 6, 2008, available at <http://www.cnn.com/2008/LIVING/wayoflife/02/06/cops.stop.cause/index.html>. The safety of an officer serves as a paramount policy justification for many of the search warrant exceptions carved out of the Fourth Amendment. See *Warden v. Hayden*, 387 U.S. 294, 298–99 (1967) (Fourth Amendment does not require delay when doing so would endanger police safety in exigent circumstances; therefore, police had right to warrantless search for weapon inside home); *Chimel*, 395 U.S. at 763 (under valid custodial arrest, police may search immediate grabbing area of arrestee for weapons without warrant or probable cause); *Terry*, 392 U.S. at 27 (not unreasonable to conduct a non-invasive search for weapons under reasonable suspicion alone); *Maryland v. Buie*, 494 U.S. 325, 334 (1990) (quick and limited protective sweep of premises for dangerous accomplices in places where attack could be launched is reasonable, and incident to arrest). The problem arises when warrantless searches extend beyond the exigency.

<sup>260</sup> TRUST IN THE LAW, *supra* note 17, at 198. The authors note that "police officers are the legal authority with whom people most frequently interact in their everyday lives," and therefore, "[a]lthough the courts [] exercise authority of the public, the police are especially likely to control people through the threat or application of force and are a natural focus of public hostility and resistance." *Id.*

<sup>261</sup> Maclin, *Black and Blue*, *supra* note 109, at 255.

<sup>262</sup> Ditzkoff, *supra* note 51.

Rather, police officers simply invoke the authority given to them by the Supreme Court. Therefore, the legitimacy of deception (and its eventual implementation) ultimately traces back to the Supreme Court Justices. As Professor Harris wrote, "it is obvious that community policing . . . depends on mutual [trust]. As difficult as it will be to build, given the many years of disrespect blacks have suffered at the hands of the police, the community must feel that it can trust the police to treat them as law-abiding citizens . . ."<sup>263</sup> Only until the gaps within the law are closed can the public once again begin to trust the police.

### B. *The Pre-Textual Stop (Redux)*

There is no easy solution in closing the gaps within pre-textual vehicle searches. However, on a theoretical level, the Court should, at a minimum, cease to create bright line rules which produce the *wrong* result in the case at hand.<sup>264</sup> To be certain, police must have the authority to investigate if necessary, but at the same time, they should not have unlimited power to conduct an open expedition without some sort of basis for doing so.<sup>265</sup> This in turn creates a duty upon the Court to "impose sensible restrictions on when officers may pull over a car, what they may require occupants to do once the car is pulled over, and when and how the detention must terminate."<sup>266</sup> Professor Maclin argues that without these restrictions, arbitrary questioning runs the risk of violating *Terry*'s command that an investigative intrusion be "strictly tied to and justified by the circumstances which render its initiation permissible."<sup>267</sup>

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<sup>263</sup> Harris, *supra* note 18, at 309. In the context of "driving while black," Professor Harris argues that there is no reason for African Americans to trust the police when every time they drive, they are targeted as criminals. *Id.* Indeed, police departments themselves should have a strong desire to stop such racially motivated tactics, such as the "driving while black" phenomenon; however, the real problem lies in the Fourth Amendment jurisprudence which grants police officers the legal means to carry it out.

<sup>264</sup> See *Atwater*, 532 U.S. at 346-47. The Court flatly stated: "If we were to derive a rule exclusively to address the contested facts, *Atwater* might well prevail." *Id.* at 346. This point is also expressed, somewhat sarcastically, by Professor Logan: "[R]ather than erring in favor of allowing police to be 'jerks,' the Court should have deferred to reasonableness considerations militating in favor of protecting the physical and privacy interests of citizens." Logan, *supra* note 136, at 456. However, Justice Kennedy was the first to say in oral argument, "It's not a constitutional violation for a police officer to be a jerk." Transcript of Oral Argument at 21, *Atwater*, 532 U.S. 315.

<sup>265</sup> Maclin, *Traffic Stops*, *supra* note 192, at 38.

<sup>266</sup> Sklansky, *supra* note 119, at 325-26.

<sup>267</sup> Maclin, *Traffic Stops*, *supra* note 192, at 38 (citing *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

The Supreme Court has recently taken an optimistic step toward re-instilling trust in the law by rejecting the legal fiction from *Belton* that a vehicle's passenger compartment is always within a suspect's grabbing area.<sup>268</sup> In a sharp departure from *Belton*, the Court weighed in favor of the privacy interests of the individual rather than in favor of the utility of a bright line rule and held in *Arizona v. Gant* that "the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."<sup>269</sup> As demonstrated by this ruling, the Court has recognized the irrationality of justifying *Belton*'s bright line rule on the assumption that evidence needs to be protected from a suspect who cannot physically reach it.

However positive the decision in *Arizona v. Gant* may be, it alone is not a sufficient solution to the mistrust felt by minorities toward police. In certain circumstances, suspicion to stop a vehicle is often based upon the race of the driver. Due to the *Whren-Atwater-Belton* line of cases, race can be the triggering factor for a valid stop, arrest, and search.<sup>270</sup> To close the loophole created by this succession of holdings, it may be necessary to start at the very beginning: the pre-textual stop based on race. The Supreme Court has failed to realize just how humiliating, frightening, and dangerous it can be for African Americans when they are arbitrarily stopped by the police.<sup>271</sup> Not

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<sup>268</sup> *Arizona v. Gant*, No. 07-542 (U.S. Apr. 21, 2009). Additionally, the Court refused to "[rely] on *stare decisis* to justify the continuance of an unconstitutional police practice." *Arizona v. Gant*, No. 07-542, slip op. at 10–11 (U.S. Apr. 21, 2009).

<sup>269</sup> *Arizona v. Gant*, No. 07-542, slip op. at 10 (U.S. Apr. 21, 2009). In fact, the Court stated that "it is anathema to the Fourth Amendment" to allow any vehicle search based on an arrest if the only purpose is a police entitlement. *Arizona v. Gant*, No. 07-542 slip op. at 14 (U.S. Apr. 21, 2009).

<sup>270</sup> See *infra* Part III.C.2.

<sup>271</sup> Sklansky, *supra* note 119, at 272. The Court of Appeals for the Ninth Circuit provided a glimpse into the discrepancy in treatment that even famous African Americans must endure:

The police have also erroneously stopped businessman and former Los Angeles Laker star Jamaal Wilkes in his car and handcuffed him, and stopped 1984 Olympic medalist Al Joyner *twice* in the space of twenty minutes, and once forcing him out of his car, handcuffing him, and making him to lie spread-eagled on the ground at gunpoint . . . Similarly, actor Wesley Snipes was taken from his car at gunpoint, handcuffed, and forced to lie on the ground while a policeman kneeled on his neck and held a gun to his head.

*Washington v. Lambert*, 98 F.3d 1181, 1182 n. 1 (9th Cir. 1996) (internal citations omitted) (emphasis original).

only can an unreasonable arrest for a traffic violation be embarrassing,<sup>272</sup> but such arrest can be perilous to the African American, given that the police seem to be quick to draw their weapons.<sup>273</sup> Some scholars have forcefully argued that the Court's refusal to take race into consideration was a "wrong turn," since "social science data [reflects that] the Court has underestimated the extent to which racial factors affect an individual officer's perceptions, memory, and reporting, transforming what may be innocent behavior into indicia of criminality and the basis for a search or seizure."<sup>274</sup> This Note is not arguing for an automatic, heightened scrutiny standard; it is merely asserting that the Supreme Court should not have pushed all considerations of race out of the Fourth Amendment analysis.<sup>275</sup> Although the Court in *Whren* obviously admonished blatant racism, it deferred attacks on the racial motivations of a vehicle stop to the Equal Protection Clause: "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."<sup>276</sup> Of course, such claims based on racism do properly fit within the Equal Protection Clause; however, this should not necessarily preclude the Court from taking race into consideration under the Fourth Amendment—especially when race does serve as a strong motivating factor in so many seizures and searches.<sup>277</sup>

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<sup>272</sup> See Harris, *supra* note 18, at 270–71. When an African American social worker in her early thirties was arrested on her way to work, she burst into tears as she was handcuffed on a public street, put in the back of a patrol car, and watched as her vehicle was searched. *Id.* Even as time passed, she still felt the pain, fear, and humiliation of the incident, "I didn't want anyone to know," she said, "I was so embarrassed." *Id.*

<sup>273</sup> See Lambert, 98 F.3d at 1183 n. 1.

<sup>274</sup> Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1012 (1999).

<sup>275</sup> See Sklansky, *supra* note 119, at 328.

<sup>276</sup> *Whren*, 517 U.S. at 813. The Equal Protection Clause contained within the Fourteenth Amendment states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1.

<sup>277</sup> Thompson, *supra* note 274, at 961 (arguing that "it is too soon to take the Fourth Amendment off the table as a source of relief for racially motivated searches and seizures."). The text of the Fourth Amendment does not provide a remedy for a constitutional violation; therefore the Supreme Court has devised its own remedy via the "exclusionary rule." *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (applying the exclusionary rule to the states). This doctrine provides that when an item has been illegally seized through an unreasonable search, it cannot be used in the prosecution's case-in-chief against the victim of the search. *Id.* at 655. There are three important aspects of this doctrine. First, it is an incredibly narrow rule and subject to many exceptions. See, e.g., *United States v. Leon*, 468 U.S. 897, 922 (1984) (exclusionary rule will not suppress evidence seized pursuant to an invalid search warrant if the police relied on the warrant in objectively reasonable good faith). Second, the Supreme Court has eroded this doctrine into a "judicially created remedy designed to safeguard Fourth Amendment rights



*C. Seizure of People (Redefined)*

The anomaly between a legal seizure and a layman's conception of seizure is inconsistent, and even divergent, when they should be synonymous.<sup>278</sup> The Supreme Court must take into consideration that a reasonable person often does not feel free to leave the presence of a police officer. The Court's underestimation of how intimidated an individual feels near police is apparent in its opinions and in the way the Court distributes the burden between police and the public.<sup>279</sup> Instead of placing the burden on the individual to remove himself from the encounter by walking away, the Court *should* place the burden on police officers by limiting their authority to interrogate citizens, unless there is a particularized and objective justification for doing so.<sup>280</sup> If the police lack this basis for seizing a person, the citizen should be able to decide whether they would like to deal with the police, if at all, *without it being used against them*.<sup>281</sup> This is the gap in the law that the Supreme Court should close: "When the officer lacks any individualized suspicion of wrongdoing, surely a citizen's refusal to comply with the officer's command is no justification for escalating the intrusiveness of the encounter."<sup>282</sup> Although the Supreme Court has given citizens the opportunity to walk away from a police officer,<sup>283</sup> to depart a bus during a

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generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974) (emphasis added). Since it is judicially created, it can be judicially taken away: the Court has recently rendered the exclusionary rule nearly null by hinting that it does not apply when police fail to "knock and announce" while executing a search warrant. *Hudson v. Michigan*, 547 U.S. 586, 594 (2006). But the most important aspect of the exclusionary rule for this Note's purposes is that it fails to provide an adequate remedy for the innocent. The doctrine itself is triggered only when there is evidence to be suppressed in a subsequent prosecution. It will only affect those individuals who actually had evidence illegally seized from them. The rule does not affect a person who has been illegally searched and seized, yet had no evidence taken away.

<sup>278</sup> Maclin, *Locomotion*, *supra* note 199, at 1301.

<sup>279</sup> *Id.* at 1303.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*; See also Herbert, *supra* note 246, at 159 ("The *Wardlow* decision effectively encourages police to create and skew the information gathered from their experience to convince courts that reactive flight is always indicative of criminality.").

<sup>282</sup> Maclin, *Locomotion*, *supra* note 199, at 1295–96.

<sup>283</sup> *Mendenhall*, 446 U.S. at 544.

sweep,<sup>284</sup> and to move about a factory during a raid,<sup>285</sup> the consequences of refusing a police officer's request are usually more troubling to the citizen.<sup>286</sup>

In Fourth Amendment issues, the Court is constantly balancing individual liberties and the legitimate interest of furthering police investigations and protecting police safety.<sup>287</sup> Yet in decisions such as *Terry* and *Mendenhall*, the balance is clearly in favor of the police, thereby exposing innocent citizens to the deceptive tactics allowed under the Fourth Amendment. This deception usually falls heavily on the shoulders of African Americans since it still appears that race is a significant factor in how police choose who to stop for investigatory searches and seizures.<sup>288</sup> Professor Maclin strongly advocates that because the dynamics between a black male and a police officer are so unique, race should be a viable factor in defining "the reasonable man" under *Terry-Mendenhall*.<sup>289</sup> In many ways, the hypothetical reasonable and average person is not representative of an African American inner-city man. In at least recognizing that black men are more disadvantaged when it comes to Fourth Amendment application, the Supreme Court could begin to grant them what the Constitution promises: fair treatment under the law.<sup>290</sup> Professor Maclin's argument was groundbreaking in the early 1990s, and, a decade later, it would be a viable option in remedying the distrust which has fueled the Stop Snitching movement.

It is tempting to advocate safety on the streets in exchange for the sacrifice of the individual liberties of some (namely African Americans and Hispanic Americans); however, this cannot be the foundation of a feasible solution to combating crime. Some advocate more aggressive "gun

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<sup>284</sup> *Drayton*, 536 U.S. at 194.

<sup>285</sup> *Delgado*, 466 U.S. at 210.

<sup>286</sup> See Maclin, *Black and Blue*, *supra* note 109, at 258. "The black male who is stopped is left with little choice but to remain calm and silent. Challenging the police or becoming belligerent is not an advisable course of conduct, although some individuals do choose this option." *Id.* Although there may be exceptions, Professor Maclin notes that most individuals stopped by the police do not offer resistance for this reason.

<sup>287</sup> Maclin, *Locomotion*, *supra* note 199, at 1302; see also Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 247 (1993) ("The Court's rational basis model essentially asks whether the police have acted irrationally while intruding upon the Fourth Amendment rights of individuals. The Court's model rarely requires warrants . . . and prefers deference to police procedures as the mode of constitutional decisionmaking.").

<sup>288</sup> Maclin, *Black and Blue*, *supra* note 109, at 268. This is, of course, denied by many law enforcement officers; yet even if such racist motives are not at play—the mere perception that they are is just as detrimental.

<sup>289</sup> *Id.* at 250.

<sup>290</sup> *Id.* at 272.

frisking.”<sup>291</sup> However, the implementation of plans such as these is what inspires the Stop Snitching movement. Allowing innocent African Americans to constantly be the target of additional searches, seizures, and suspicions will only harbor more distrust. Even if targeting African Americans through the loopholes in the law did reduce the crime rate, this justification alone should not be used to sacrifice the constitutional liberties of an entire cohort of citizens. A reduction in crime would be a benefit, but a short-term one at best because the long-term ramifications of distrust (such as the Stop Snitching movement) are far more detrimental to the justice system.

## V. CONCLUSION

It is hard to stop a movement that has already swelled far beyond its tipping point.<sup>292</sup> In Gladwell’s terms, the Stop Snitching movement has proven to be both “contagious” in its transmission, and “sticky” in its pervasiveness.<sup>293</sup> There are two choices in countering the movement: policy-makers could hinder the dissemination of the message, or they could undermine the public’s desire to follow the code. The most viable and potentially successful option is the latter. Although it would be desirable to somehow prevent the Stop Snitching message from further transmission, the current laws in this country are ill-equipped to do so. The First Amendment cannot restrain the artistic medium by which the message spreads—no matter how infuriating the outcome may be to prosecutors and police. Moreover, current state obstruction of justice laws cannot punish *inaction*. Yet even if they did, this would not be the best way to stop the movement.

Instead, the focus needs to be on making the epidemic less “sticky”<sup>294</sup>—in other words, finding a way to make the Stop Snitching code less attractive to follow. The answer is to repair the distrust which has been building between African Americans and law enforcement for decades. Trust is paramount in any relationship, and this notion is no different when applied to the intricate interplay between the public and the police.<sup>295</sup> However, the police are not the primary source of the distrust—that path leads to the chambers of the Supreme Court of the United States. In a series of decisions,

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<sup>291</sup> Wilson, *supra* note 204 and accompanying notes. Wilson expressly notes that stopping and frisking young black and Hispanic men at a higher rate is worth the potential benefits of reducing the number of firearms on the streets. *Wilson, supra* note 204.

<sup>292</sup> See GLADWELL, *supra* note 1, at 233.

<sup>293</sup> See *id.* Gladwell discusses what he calls the “sticky factor” of teenage smoking, and how difficult it has been for policy-makers to counter the epidemic. *Id.*

<sup>294</sup> *Id.* at 250.

<sup>295</sup> TRUST IN THE LAW, *supra* note 17, at 175.

the Supreme Court has created a body of Fourth Amendment law that both blatantly and covertly allows for deception. The Court has *blatantly* allowed the use of deception to stop and search a vehicle, even when there is no probable cause. It has also *covertly* permitted deception within the realm of seizure of people by creating a test which is not congruent with how “reasonable people” truly feel and by providing police a means to target certain “high crime people”. The perceived unfairness, illogicality, and unreasonableness of the Supreme Court serves as a catalyst for the anger that the public feels when they are subjected to the Court’s holdings in stops and searches that happen every day in every city. When such a broad amendment touches so many lives, it is the Supreme Court’s duty, not only to maintain a veneer of trustworthiness, but to embody it. Instilling trust within the law is the first step to countering the Stop Snitching movement—it is *the critical step* in ending this epidemic.